80-1990
No.

Office-Supreme Court, U.S.
FILED
MAY 26 1981
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

CASPAR WEINBERGER, ET AL., PETITIONERS

v.

CARLOS ROMERO-BARCELO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

WADE H. MCCREE, JR.
Solicitor General
ANTHONY C. LIOTTA
Acting Assistant Attorney General
EDWARD J. SHAWAKER
ANNE S. ALMY
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether injunctions to require immediate cessation of discharges in violation of the Clean Water Act are mandatory under the standards articulated in *TVA* v. *Hill*, 437 U.S. 153 (1978), and not subject to the traditional equitable discretion of the district court.[1]

---

[1] In addition to the Secretary of Defense, the defendants below included the Secretary of the Navy, the Chief of Naval Operations, the Commander in Chief of the Atlantic Fleet, the Commandant of the Marine Corps, the Carribbean Commander of the Atlantic Fleet, the Commandant of the Coast Guard, and "unnamed John Doe Defendants." In addition to Carlos Romero-Barcelo, the Governor of the Commonwealth of Puerto Rico, the original plaintiffs below included the Mayor of Vieques, the Commonwealth Environmental Quality Board, Misión Industrial de Puerto Rico, Inc., and individual fishermen/residents of Vieques: Luis Medina, Jesús Medina, Mario Antolino Félix, Cristóbal Medina, Severino Ventura Cintrón, Héctor Medina, Cristóbal Medina, Jr., Enrique García, Antonio Ayala González, Angel Ventura and Daniel Medina. Plaintiffs-intervenors included: Carlos A. Zenón, Mario Félix, Mariano Rivera Guishard, Alicio Ayala Sota, Francisco Medina Meléndez, Esmeraldo Meléndez and Santos Ríos, fishermen who are residents of Vieques, the 'Asociación de Pescadores de Vieques, Inc.," a cooperative of Vieques fishermen, and "Fundación Arqeuológica, Antropológica e Histórica de Puerto Rico," a non-profit corporation involved in research and preservation of historical and prehistorical cultural resources (App. C, *infra*, 54a).

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statute involved	1
Statement	2
Reasons for granting the petition	5
Conclusion	16
Appendix A	1a
Appendix B	52a
Appendix C	53a
Appendix D	169a
Appendix E	171a

TABLE OF AUTHORITIES

Cases:

Consolidation Coal v. *Costle*, 604 F.2d 239	5, 10
E.I. du Pont de Nemours & Co. v. *Train*, 430 U.S. 112	12
Hecht Co. v. *Bowles*, 321 U.S. 321	10–11
Milwaukee v. *Illinois*, No. 79–408 (Apr. 28, 1981)	5
Monongahela Power Co. v. *EPA*, 586 F.2d 318	9, 10
National Rifle Ass'n v. *Kleppe*, 425 F. Supp. 1101, aff'd, 571 F.2d 674	13
Realty Income Trust v. *Eckerd*, 564 F.2d 447	10
Republic Steel Corp. v. *Costle*, 581 F.2d 1228	9
Reserve Mining Co. v. *EPA*, 514 F.2d 492	8
State Water Resources Board v. *Train*, 559 F.2d 921	5, 10
TVA v. *Hill*, 437 U.S. 153	5, 6, 7, 8, 14
United States v. *Kennebec Log Driving Co.*, 491 F.2d 562, on remand, 399 F. Supp. 754	8

Cases (continued): Page

United States v. *Rohm & Haas Co.*, 500 F.2d 167, cert. denied, 420 U.S. 962 8
United States ex rel. Greathouse v. *Dern*, 289 U.S. 352 11

Statutes and regulations:

Clean Air Act Amendments of 1977, 42 U.S.C. (Supp. III) 7401 *et seq.* 2
Coastal Zone Management Act, 16 U.S.C. 1451 *et seq.* 2
Endangered Species Act, 16 U.S.C. (& Supp. II) 1531 *et seq.* 2, 4
Section 2(b), 16 U.S.C. 1531(b) 7
Section 2(c), 16 U.S.C. 1531(c) 7
Section 7, 16 U.S.C. 1536 ..... 4, 5, 6, 7, 9
Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. (& Supp. III) 1251 *et seq.* 1, 2, 3, 171a
Section 101(a), 33 U.S.C. 1251(a)... 11–12, 171a
Section 301(a), 33 U.S.C. 1311(a).11–5, 7, 8, 171a
Section 301(b), 33 U.S.C. (& Supp. III) 1311(b) 12, 171a
Section 301(b)(1), 33 U.S.C. 1311(b)(1) 11–9, 171a
Section 304(b), 33 U.S.C. (Supp. III) 1314(b) 12, 173a
Section 309, 33 U.S.C. 1319 ..... 10, 173a
Section 309(a)(1), 33 U.S.C. (Supp. III) 1319(a)(1) 11, 173a
Section 309(a)(5)(B), 33 U.S.C. (Supp. III) 1319(a)(5)(B) 10, 173a–174a
Section 309(b), 33 U.S.C. 1319(b) 8, 10, 174a
Section 313(a), 33 U.S.C. (Supp. III) 1323(a) 7, 8, 14, 15, 174a–175a
Section 401(a), 33 U.S.C. (Supp. III) 1341(a) 13, 175a–176a
Section 402(a), 33 U.S.C. 1342(a)... 13, 15, 177a

Statutes and regulations (continued): Page

Section 502(6), 33 U.S.C. 1362(6) ... 4, 177a–178a
Section 502(12), 33 U.S.C. 1362(12) ... 4, 178a
Section 502(14), 33 U.S.C. (Supp. III) 1362(14) ... 4, 178a
Section 504(a), 33 U.S.C. (Supp. III) 1364(a) ... 8, 178a–179a
Section 505(b)(1)(A), 33 U.S.C. 1365(b)(1)(A) ... 13, 179a
Section 505(b)(1)(B), 33 U.S.C. 1365(b)(1)(B) ... 9, 180a
Section 505(c), 33 U.S.C. 1365(c)(2) ... 11, 180a
Marine Mammal Protection Act, 16 U.S.C. 1361 *et seq.* ... 2
Migratory Bird Treaty Act, 16 U.S.C. 703 *et seq.* ... 13
National Environmental Policy Act, 42 U.S.C. (& Supp. III) 4321 *et seq.* ... 2, 14
National Historic Preservation Act, 16 U.S.C. 470 *et seq.* ... 2
Noise Control Act of 1972, 42 U.S.C. 4901 *et seq.* ... 2
Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.* ... 2
Rivers and Harbors Appropriation Act of 1899 (Refuse Act), 33 U.S.C. 401 *et seq.* ... 3
Section 13, 33 U.S.C. 407 ... 8
40 C.F.R.:
Section 123.9(c) ... 11
Part 400 *et seq.* ... 12

Miscellaneous:

A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess. (1973) ... 8, 9, 12
Environmental Quality—1979 ... 9

Miscellaneous—Continued: Page

Exec. Order No. 11593, 36 Fed. Reg. 8921 (1971) *reprinted in* 16 U.S.C. 470 note 2, 3, 4
Exec. Order No. 12088, 43 Fed. Reg. 47707, 47709 (1978) 15
46 Fed. Reg. 12773 (1981) 3
Hearings on Federal Water Pollution Control Act Amendments of 1977 Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works, 95th Cong., 1st Sess. (1977) 10
H.R. Rep. No. 92–911, 92d Cong., 2d Sess. (1972) . 12
H.R. Rep. No. 93–412, 93d Cong., 1st Sess. (1973) . 7
S. Rep. No. 92–414, 92d Cong., 1st Sess. (1971) ... 8
S. Rep. No. 93–307, 93d Cong., 1st Sess. (1973) ... 7
7 *Moore's Federal Practice* 2d ed. 1980) 11

In the Supreme Court of the United States

OCTOBER TERM, 1980

No.

CASPAR WEINBERGER, ET AL., PETITIONERS

v.

CARLOS ROMERO-BARCELO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the Secretary of Defense and other officials of the Department of Defense, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a–51a) is not yet reported. The opinion of the district court (App. C, *infra*, 53a–168a) is reported at 478 F. Supp. 646.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1981 (App. D, *infra*, 169a–170a). A timely petition for rehearing was denied on February 27, 1981 (App. B, *infra*, 52a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The pertinent provisions of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. (& Supp. III) 1251 *et seq.*, are reprinted in App. E, *infra*, 171a–180a.

STATEMENT

This case concerns the Navy's use of part of Vieques Island, Puerto Rico, as a range for air-to-ground, naval gunfire support (NGFS) and amphibious weapons training. The island, located off the southeast coast of Puerto Rico, is approximately 20 miles long and has an average width of 4 miles. It consists of approximately 33,000 acres, of which the United States owns more than 25,000 acres. For many years, the Department of the Navy has used a small portion of the eastern end of the island for weapons training. The remaining Navy-held land is used primarily as a buffer zone. (See App. C, *infra*, 57a, 61a, 63a, 167a–168a.)

The weapons training facilities located on Vieques are crucial to the national defense. The installations on and around the island are the only facilities available to the naval vessels and crews of the Atlantic Fleet that provide an opportunity to train under conditions closely resembling actual combat. All Atlantic Fleet vessels assigned to the Mediterranean and the Indian Ocean must complete their training at Vieques to become operational. Cessation of Navy activity on Vieques would cripple the service's ability to perform the tasks assigned to it by the National Security Council. (See App. C, *infra*, 163a–165a.)

On March 1, 1978, the Governor of Puerto Rico, Carlos Romero-Barcelo, and others initiated a suit seeking to enjoin continued use of the island for weapons training. In his complaint, the Governor charged the Navy with violations of almost every piece of major environmental legislation enacted by Congress in the last decade. These included the National Environmental Policy Act (NEPA), 42 U.S.C. (& Supp. III) 4321 *et seq.*; the Clean Water Act, 33 U.S.C. (& Supp. III) 1251 *et seq.*; the Clean Air Act Amendments of 1977, 42 U.S.C. (Supp. III) 7401 *et seq.*; the Noise Control Act of 1972, 42 U.S.C. 4901 *et seq.*; the Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*; the Endangered Species Act, 16 U.S.C. (& Supp. III) 1531 *et seq.*; the National Historic Preservation Act, 16 U.S.C. 470 *et seq.* (and Exec. Order No. 11593, 36 Fed. Reg. 8921 (1971) *reprinted in* 16 U.S.C. 470 note, which implements that Act); the Coastal Zone Management Act, 16 U.S.C. 1451 *et*

seq.; and the Marine Mammal Protection Act, 16 U.S.C. 1361 *et seq.* In addition, the Governor claimed violations of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 401 *et seq.*, various amendments to the United States Constitution, and congressional and presidential directives concerning cessation of Navy operations on the neighboring island of Culebra (see App. C, *infra*, 55a–56a).

The district court held an extensive hearing on the merits of these allegations. On September 17, 1979, the court filed a comprehensive decision and order (App. C, *infra*, 53a–168a). It found the Navy in violation of NEPA for failure to file an Environmental Impact Statement (EIS) or a reviewable environmental record to support a decision not to file such a statement (*id.* at 155a–159a). It held the Navy to be in violation of the Clean Water Act, 33 U.S.C. (& Supp. III) 1251 *et seq.*, for occasionally and inadvertently discharging ordnance into coastal waters without a National Pollutant Discharge Elimination System (NPDES) permit (App. C, *infra*, 79a–81a). It also found the Navy had failed to comply fully with Exec. Order No. 11593, *supra*, as it had not nominated historic sites to the National Register (App. C, *infra*, 134a–138a). It ordered the Navy to file for an NPDES permit, to nominate historic sites to the National Register and to comply with the provisions of NEPA (*id.* at 165a).[2] All other claims, including requests for injunctive relief, were dismissed (*ibid.*).

On appeal, the court of appeals affirmed the district court on most issues.[3] The court, however, disagreed with the

---

[2] The Navy prepared an environmental impact statement; in January 1981, the Secretary of the Navy reviewed the statement and made a formal decision to continue using the weapons training facilities located on Vieques. 46 Fed. Reg. 12773 (1981). The Navy also submitted 34 historic sites to the Keeper of the National Register and requested his opinion on their eligibility to be placed on the Register.

Also, on December 28, 1979, the Department of the Navy filed an application for an NPDES permit with the Environmental Protection Agency.

[3] In addition to the Clean Water Act issue presented in this petition, the court of appeals remanded issues under the Endangered Species Act and the National Historic Preservation Act to the district court for

district court on the proper standards for fashioning equitable or injunctive relief to remedy violations of the Clean Water Act (App. A, *infra*, 48a–49a). The district court had held that the Navy was in violation of the Act because it did not have an NPDES permit covering the occasional deposit of ordnance into the coastal waters around Vieques.[4] These deposits occur in connection with NGFS and air-to-ground

---

further consideration (App. A, *infra*, 51a). The district court had found that the Navy's use of Vieques did not violate Section 7 of the Endangered Species Act (ESA), 16 U.S.C. 1536 (App. C, *infra*, 126a–131a). The Navy had not obtained a biological opinion from the Fish and Wildlife Service at the time of trial. (The regulations creating the biological opinion process were promulgated on January 4, 1978 43 Fed. Reg. 870 (1978), less than two months before the complaint was filed in this case; during the district court hearing, the ESA was amended on November 10, 1978, 16 U.S.C. (Supp. II) 1531 *et seq.*, to incorporate features of those regulations.) Subsequent to trial, the Fish and Wildlife Service issued an opinion agreeing with the district court. The court of appeals remanded to permit judicial review of the biological opinion and to consider other related issues (App. A, *infra*, 38a–42a).

The district court had also ruled that a cultural resources survey of Vieques satisfied the Navy's obligation to "locate" historic sites under Exec. Order No. 11593, *supra*. The court of appeals vacated that determination, and remanded to the district court to consider what additional survey effort should be required (App. A, *infra*, 42a–47a). The petitioners do not consider that either of these rulings present any issue ripe for review by this Court.

[4]The Clean Water Act defines pollutant to include "munitions" Section 502(6), 33 U.S.C. 1362(6). A "point source" means "any discernible, confined and discrete conveyance, including but not limited to any * * * vessel * * * from which pollutants are or may be discharged" Section 502(14), 33 U.S.C. (Supp. III) 1362(14). Under these definitions, shells and bombs released from naval ships and aircraft can be deemed pollutants discharged from point sources. The firing of ordnance into waters outside the territorial sea (three miles), however, is not subject to the Clean Water Act. See Section 502(12), 33 U.S.C. 1362(12).

Because the literal language of the definitions of the Clean Water Act covers inadvertant release of shells and bombs into the coastal waters off Vieques, and the Environmental Protection Agency was willing to develop an appropriate NPDES permit, the petitioners did not appeal the district court ruling that the Clean Water Act was violated. Before this suit was filed, however, the Navy had not antic-

training when the land-based targets are missed, and the ordnance hits the water. The district court found that this violation of the Clean Water Act was technical, and there was no evidence that Navy activity had any significant adverse environmental effect on the waters (App. C, *infra*, 80a, 162a). Accordingly, the district court ordered the Navy to obtain a permit but declined to enjoin the Navy activity on Vieques pending issuance of a permit (App. C, *infra*, 162a, 165a).

The court of appeals, however, ruled that the district court had no discretion to refrain from issuing an injunction against activity that violates the Clean Water Act (App. A, *infra*, 48a–49a). It deemed the prohibition against unlicensed discharges of pollutants in Section 301(a), 33 U.S.C. 1311(a), to be a "congressional ordering of priorities" (App. A, *infra*, 48a) similar to Section 7 of the Endangered Species Act considered in *TVA* v. *Hill*, 437 U.S. 153, 194 (1978). Accordingly, it vacated the remedy devised by the district court and remanded with directions to enter an appropriate injunction (App. A, *infra*, 49a).

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals conflicts in principle with decisions of the Fourth Circuit, which reaffirm the power of the courts to withhold injunctive relief to remedy violations of the Clean Water Act when such relief would be inequitable. *State Water Control Board* v. *Train*, 559 F.2d 921 (1977); *Consolidation Coal Co.* v. *Costle*, 604 F.2d 239 (1979).[5] Unless reversed, the decision below will result in a significant adverse impact on military preparedness; moreover, the precedent established will unnecessarily disrupt a wide variety of federal and private activities in the First

---

ipated that an NPDES permit might be required for such activities, partly because the EPA has not issued effluent guidelines or permits for similar activities. See note 10, *infra*, page 13.

[5]Moreover, this Court recently characterized a state enforcement action that did not seek the immediate cessation of discharges in violation of the Act as an action "contemplated by the Act." *Milwaukee* v. *Illinois*, No. 79–408 (Apr. 28, 1981), slip op. 16.

Circuit,[6] and in any other circuits that follow the decision below. These serious adverse effects are the result of a misapplication of this Court's decision in *TVA* v. *Hill*, 437 U.S. 153 (1978) and a serious misconception of the function of the statutory provision for presidential exemptions from the requirements of the Clean Water Act.

1. In *TVA* v. *Hill*, *supra*, 437 U.S. at 194, this Court ruled that the federal courts lacked discretion to deny injunctive relief against a federal action that would violate Section 7 of the Endangered Species Act, 16 U.S.C. 1536. Section 7 requires federal agencies to "insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of [any] endangered species * * * or result in the destruction or modification of habitat of such species which is determined * * * to be critical." The challenged federal action was closing the gates to the Tellico Dam; it was conceded that this action would result in the elimination of the known population of snail darters—an endangered species—and destruction of the species' critical habitat (437 U.S. at 161–163).

In discussing the discretion of the lower federal courts to deny relief, this Court acknowledged that, as a general rule, courts are "not mechanically obligated to grant an injunction for every violation of law" (437 U.S. at 193). But this Court determined that, in the ESA, Congress "has decided the order of priorities" and has made it "abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities" (*id.* at 194). Accordingly, the Court ruled that a federal court was powerless to strike a different balance between competing interests. The source of the congressional ordering of priorities was found in Section 7 of the Endangered Species Act, which contains a clear congressional ordering of priorities between two distinct interests: federal actions and the continued existence of endangered species.

---

[6] Since the court's decision did not turn on the particular language of the Clean Water Act (App. A, *infra*, 48a–49a), the same rationale may require the injunction of technical violations of other environmental statutes.

The federal action at issue in *TVA* v. *Hill*, *supra*, moreover, would have directly and irrevocably harmed interests protected by the ESA. The purposes of the ESA include "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" and "to provide a program for the conservation of such endangered species * * *" (Section 2(b), 16 U.S.C. 1531(b)). Another purpose was to direct federal agencies to use their authorities to protect endangered species (Section 2(c), 16 U.S.C. 1531(c)). See H.R. Rep. No. 93-412, 93d Cong., 1st Sess. 10 (1973); S. Rep. No. 93-307, 93d Cong., 1st Sess. 6 (1973). Closing the gates of the Tellico Dam, and destruction of the snail darter, would have been directly and fundamentally in conflict with the purposes of the Act.

In sum, the result in *TVA* v. *Hill*, *supra*, was dictated by two factors. First, Congress had already considered, and specifically provided for, a conflict between the needs of endangered species and other interests of the federal government. It had struck the balance in favor of the listed species and the courts were powerless to reconsider that decision. Second, the violation of Section 7 was substantial. The TVA action would not only have failed to comply with the terms of Section 7, but also would have destroyed an endangered species and its critical habitat. Thus, to implement the purposes and policies of the ESA, an injunction restraining the TVA action had to be issued. The court of appeals' broad application of the analysis of *TVA* v. *Hill*, *supra*, to violations of the Clean Water Act is unsupported by either of these two factors.

a. There is no congressional "ordering of priorities" here. The Clean Water Act does not contain any explicit congressional statement, similar to Section 7 of the ESA, subordinating other federal interests to the preservation of water purity. In contrast to the flat ban on the destruction of critical habitats in Section 7, the Clean Water Act is designed to control discharges of pollutants by subjecting them to a licensing program (Section 301(a) of the Act, 33 U.S.C. 1311(a)). And Section 313(a), 33 U.S.C. (Supp. III) 1323(a), imposes a duty on federal agencies to comply with water pollution abatement requirements "in the same man-

ner, and to the same extent as any non-governmental entity * * *." Neither Section 301(a) nor Section 313(a) imposes any duty on federal agencies or restrictions on federal actions that do not apply equally to all other dischargers of pollutants. Thus, unless the restrictions of Section 301(a) are deemed to override every competing interest held by anyone in the Nation, the Clean Water Act does not contain an "ordering of priorities" which the Courts are powerless to alter.

The Act cannot reasonably be read as imposing such overriding restrictions. While Congress expected the Clean Water Act to be vigorously enforced, there is nothing in the Act or its history to suggest that Congress intended to limit the traditional role of the courts in the enforcement process. Cf. *TVA* v. *Hill*, *supra*, 437 U.S. at 193–194.[7] There is instead strong evidence the Congress contemplated that the federal courts would exercise their usual equitable discretion in fashioning "appropriate relief, including a permanent or temporary injunction" against violations of the Act (Section 309(b) of the Act, 33 U.S.C. 1319(b).[8]

---

[7]The legislative history shows that in developing the enforcement scheme of the Act, Congress intentionally drew on the enforcement mechanisms developed under Section 13 of the Rivers and Harbors Appropriation Act of 1899 (the Refuse Act), 33 U.S.C. 407. See S. Rep. No. 92–414, 92d Cong., 1st Sess. 63 (1971), *reprinted in A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong., 1st Sess. 1481 (1973) ("*Legislative History*"). See also *Legislative History 1306*. Under that Act, injunctions requiring immediate cessation of discharges in violation of the Act were not automatic. Instead, courts carefully fashioned appropriate relief to vindicate the purposes of the statute with due regard to the surrounding facts and circumstances. See, *e.g.*, *Reserve Mining Co.* v. *EPA*, 514 F.2d 492, 535–537 (8th Cir. 1975); *United States* v. *Rohm & Haas Co.*, 500 F.2d 167, 195 (5th Cir. 1974), cert. denied, 420 U.S. 962 (1975); *United States* v. *Kennebec Log Driving Co.*, 491 F.2d 562, 571 (1st Cir. 1973), on remand, 399 F. Supp. 754, 759 (D. Me. 1975).

[8]Congress did specify certain circumstances when discharges of pollutants were to be immediately enjoined. In Section 504(a), 33 U.S.C. (Supp. III) 1364(a), it authorized the Administrator of the Environmental Protection Agency to bring suit "to immediately restrain"

The entire structure of the Clean Water Act confirms the need for flexibility in developing "appropriate" enforcement mechanisms, and the history of the development of the current version of the Act confirms congressional recognition of that need. The Act sets out a complicated and phased system of pollution abatement punctuated with statutory deadlines. When the statute was first enacted in 1972, Congress was aware that the deadlines might prove to be unattainable. See *Legislative History* 174–175. In fact, the original deadlines, requiring the best practicable control technology and secondary treatment by 1977 (Section 301(b)(1), 33 U.S.C. 1311(b)(1)), were not met by approximately 20% of major industrial dischargers and 60% of major municipal dischargers in the nation. *Environmental Quality—1979* at 113–114. As the 1977 deadline approached, the EPA realized that many dischargers would not be able to comply with the requirements of the Act through no fault of their own. EPA, however, was not authorized to issue NPDES permits that delayed compliance beyond July 1, 1977. See *Republic Steel Corp.* v. *Costle*, 581 F.2d 1228, 1232 (6th Cir. 1978). The Agency developed a program of extending the compliance period through prosecutorial restraint. It issued an Extended Compliance Schedule Letter (ECSL) to deserving dischargers, pledging not to bring an enforcement action as long as the discharger complied with the extended schedule of progress. See *Monongahela Power Co.* v. *EPA*, 586 F.2d 318, 320 (4th Cir. 1978).

When Congress considered the 1977 Amendments to the Act, administration spokesmen recommended against a broad extension of the date of compliance. They argued that prosecutorial discretion in federal enforcement would

---

discharges of pollutants that he finds to be causing or contributing to "an imminent and substantial endangerment to the health of persons or to the welfare of persons * * *." This provision is the only section of the Clean Water Act that approaches the congressional ordering of priorities this Court found in Section 7 of the Endangered Species Act. It also is strong evidence that Congress did not expect that a rule of automatic, immediate restraint would be applied to other violations of the Act.

protect a discharger unable to comply despite reasonable efforts. They also suggested that courts deciding citizens suits to enforce the Act (see 33 U.S.C. 1365(b)(1)(B)) would not take "drastic action" against such a polluter if the federal and state authorities had decided that enforcement was not appropriate. *Hearings on Federal Water Pollution Control Act Amendments of 1977 Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 95th Cong., 1st Sess. (Pt. 9) 649 (1977). See *State Water Control Board* v. *Train*, *supra*, 559 F.2d at 927; *Consolidation Coal Co.* v. *Costle*, *supra*, 604 F.2d at 246. Based on these representations, Congress codified the ECSL program by amending 33 U.S.C. 1319, which governs enforcement and remedies for violations of the Act, to authorize the EPA to grant extensions to April 1, 1979 (Section 309(A)(5)(B), 33 U.S.C. (Supp. III) 1319(a)(5)(B)). See *Monongahela Power Co.* v. *EPA*, *supra*, 586 F.2d at 320–321.

This legislative history demonstrates that neither EPA nor the Congress believed that the Clean Water Act requires the issuance of an injunction to terminate every technical violation of its requirements. If district courts lacked discretion to refuse to require immediate cessation of discharges in violation of the Act, prosecutorial restraint by the government would be of little value. Citizens, either by filing a suit or intervening in an ongoing federal action, could overturn the government's discretionary decision simply by demanding that the court issue an immediate cessation order. If Congress had so interpreted the Act, it would have been forced to take emergency action in 1977 to prevent the possibility of wholesale shutdowns of major industries and municipal wastewater treatment works.

b. An injunction forbidding unlicensed discharges into the coastal waters is not necessary to vindicate the policies of the Clean Water Act.

Equitable relief of some sort is presumptively appropriate to remedy violations of the Clean Water Act. The content of the equitable decree, however, is not necessarily immediate cessation of discharges violating the Act. Instead, courts must fashion "appropriate" relief (33 U.S.C.

1319(b)): relief that adequately vindicates the purposes and policies of the Clean Water Act with due regard to equitable principles. See *Realty Income Trust* v. *Eckerd*, 564 F.2d 447, 456–457 (D.C. Cir. 1977); see generally *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329–330 (1944); *United States ex rel. Greathouse* v. *Dern*, 289 U.S. 352, 360–361 (1933); 7 *Moore's Federal Practice* ¶ 65.18[3] at 65–133 to 65–140.1 (2d ed. 1980).

If the EPA is a party to the civil action, either as the plaintiff in a federal enforcement action or as an intervenor in a citizens suit (see 33 U.S.C. 1365(c)(2)), the court will have the recommendation of the Administrator as to the appropriate form of equitable relief.[9] Ordinarily, we would expect a district court to defer to the EPA's judgment of an appropriate remedial order absent a finding that the EPA's request is arbitrary or capricious or ignores relevant factors. In cases such as this, where the EPA is not a party to an action and has not otherwise addressed the question of an appropriate remedy (through, for example, a compliance order (33 U.S.C. (Supp. III) 1319(a)(1)), a district court must fashion a remedy independently. The touchstone of any order must be to attempt to bring the discharger into compliance with the Act. But the surrounding facts and circumstances should be evaluated to create an equitable remedy that both vindicates the purposes and policies of the Clean Water Act and applies general equitable principles.

The remedy ordered by the district court satisfies these standards. Although the court directed the Navy to apply for a NPDES permit, it declined to enjoin the Navy activity which results in discharges pending issuance of the permit. This order vindicates the purposes of the Clean Water Act

---

[9]In developing a remedial program, the Administrator considers such factors as the practicality of a time schedule for compliance, good faith of the discharger, national uniformity of treatment for classes and categories of dischargers and competing interests in health, safety and welfare. And, while lack of environmental damage is not a defense to violation of the Clean Water Act, the likelihood of irreparable degradation of water quality would suggest rigorous remedial action. Cf., 40 C.F.R. 123.9(c).

by bringing the Navy into compliance with the Act, and reflects a proper balance of the equitable factors involved.

The overall purpose of the Clean Water Act is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters" (Section 101(a), 33 U.S.C. 1251(a)). The word integrity "refers to a condition in which the natural structure and function of ecosystems is maintained" (H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 76 (1972), *reprinted in Legislative History* 763. An ecosystem whose structure and function is natural was defined as "one whose systems are capable of preserving themselves at levels believed to have existed before irreversible perturbations caused by man's activities" (H.R. Rep. No. 92-911, *supra*, at 77, *reprinted in Legislative History* 764. The district court found that "the activities of defendant Navy are not causing any appreciable harm to the Vieques ecology" (App. C, *infra*, 162a). The evidence presented at trial established that the Navy's activity on Vieques—including the occasional, inadvertant release of ordnance into the coastal waters—does not adversely modify the ability of the waters to sustain animal or plant life through turbidity, sedimentation or changes in chemical composition (App. C, *infra*, 80a, 115a-126a). The coral reef and seagrass systems in waters surrounding the island were found to be healthy, functioning components of the marine environment. Therefore, an injunction was not necessary to protect the aquatic environment.

There was, moreover, no evidence that the Navy activity violated any standards and limitations of the Clean Water Act other than the permit requirement. The district court found, and the court of appeals affirmed, that the Navy activity complied with Puerto Rico water quality standards (App. A, *infra*, 18a-22a; App. C, *infra*, 81a-86a). The EPA has not issued effluent limitations for occasional deposits of ordnance pursuant to Sections 301(b) and 304(b) of the Act, 33 U.S.C. (& Supp. III) 1311(b) and 1314(b). See *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 130-133 (1977). In fact, no effluent limitations have been promulgated for activities resembling depositing ordnance unintentionally in coastal waters. See 40 C.F.R. Part 400 *et*

seq. In these circumstances, an injunction restraining the Navy activity would prohibit what the agency administering the Clean Water Act ultimately may find acceptable in issuing an NPDES permit.

In addition, the Navy has acted in good faith to comply with the requirements of the law. It had not been contended by anyone, prior to this suit, that the incidental release of ordnance into the coastal waters is subject to the permit requirements of the Clean Water Act. The EPA made several inspection visits to Vieques to ascertain the Navy's compliance with various environmental laws. The Puerto Rico Environmental Quality Board communicated with the EPA concerning the Navy's compliance with the Act, but did not suggest that a NPDES permit was required for the release of ordnance. In fact, the first inkling the Navy received that anyone thought that a NPDES permit was required was the complaint which was filed in this suit without satisfying the sixty-day notice requirement of Section 505(b)(1)(A), 33 U.S.C. 1365(b)(1)(A).[10] After the district court decision, the Navy expeditiously filed an application for a NPDES permit with the EPA. The delay in issuing the permit has rested with the EPA, which has to devise *ad hoc* conditions for the permit pursuant to Section 402(a), 33 U.S.C. 1342(a); that delay may continue due to Puerto Rico's reluctance to certify compliance with local water quality standards. See Section 401, 33 U.S.C. (Supp. III) 1341(a).

Finally, there are significant and exceptionally strong equitable considerations arguing against the imposition of an injunction in this case. The district court properly declined to enter injunctive relief that would have a profound ad-

---

[10] In a somewhat similar situation, problems associated with the deposit of shot into the water by duck hunters who miss their targets have been regulated by the Secretary of the Interior under the Migratory Bird Treaty Act, 16 U.S.C. 703 *et seq.* See *National Rifle Ass'n* v. *Kleppe*, 425 F. Supp. 1101 (D.D.C. 1976), aff'd, 571 F.2d 674 (D.C. Cir. 1978). The EPA aided the Department of the Interior in developing these regulations; there was no suggestion that duck hunters need an NPDES permit to comply with the Clean Water Act.

verse impact on the ability of the Atlantic Fleet to satisfy its national security obligations. The Navy weapons training facilities in and around Vieques are unique in the Atlantic. They provide the Atlantic Fleet with the opportunity to train under conditions resembling actual combat. The quality of training experience offered by the Vieques facilities cannot be duplicated by use of other Navy target ranges. In addition, every vessel from the Atlantic Fleet assigned to active duty in the Mediterranean or the Indian Ocean must qualify its guns on the Vieques NGFS range. (See App. C, infra, 164a–165a.)

In light of these considerations, the court of appeals' justification of an injunction on the grounds that the permit process might turn up evidence of more extensive environmental harm is chimerical. It is the primary purpose of the NEPA to develop and disclose information on the environmental impacts of federal activities. An EIS has been prepared, see note 2, *supra*, and it discloses no significant adverse effects on the coastal waters from the challenged deposits of ordnance. There is no reason to expect a different result in the permit process.

In sum, the court of appeals' opinion reflects a clear misunderstanding not only of *TVA* v. *Hill*, *supra*, but also of the purposes, policies and procedures of the Clean Water Act.

2. Contrary to the court of appeals' somewhat cavalier assumption (App. A, *infra*, 49a), the possibility of a presidential exemption pursuant to Section 313(a), 33 U.S.C. (Supp. III) 1323(a), does not adequately protect the various federal interests involved. Section 313(a) aut' rizes the President to "exempt any effluent source of a..y department * * * in the executive branch from compliance with any * * * requirement if he determines it to be in the paramount interest of the United States to do so * * *."[11] This

[11]The exemption may not exceed a year, but may be renewed if a new presidential determination is made. Annual reports to Congress are required. In addition, the President may "issue regulations exempting from compliance with the requirements of this section any weaponry, equipment, aircraft, vessels, * * * or other classes or cate-

provision is evidently intended to provide for relief only in extraordinary circumstances, when the requirements of the Act are inconsistent with essential federal activities.[12] Accordingly, Exec. Order No. 12088, 43 Fed. Reg. 47707, 47709 (1978), provides that the EPA Administrator and the Director of the Office of Management and Budget will mediate exemption requests submitted by agency heads.[13] Exemptions are granted by the President only if the conflict between pollution control standards and crucial federal activities cannot be resolved through the development of a practicable remedial program.

The court of appeals' decision seriously undermines this policy of accommodation. If violations of the Clean Water Act—and of other similar environmental statutes (see note 6, *supra*)—result in automatic immediate cessation orders, federal agencies will be strongly motivated to apply for presidential exemptions at the first indication that their critical facilities or activities may be in violation of applicable statutes or regulations. To wait until efforts at accommodation are completed would hazard an abrupt disruption of federal programs that may be vital to the health, safety and welfare of the American people.

---

gories of property * * * which are owned or operated by the Armed Forces of the United States * * * and which are uniquely military in nature" (Section 313a, 33 U.S.C. (Supp. III) 1323(a)). The President must reconsider the need for any such regulations at three year intervals; none have been issued to date (*ibid.*).

[12] For example, the Act expressly provides "[n]o such exemptions shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation * * * and the Congress shall have failed to make available such requested appropriation" (33 U.S.C. (Supp. III) 1323(a)).

[13] The federal agency is required to certify in the exemption request that it cannot meet the applicable pollution control standards. Because the EPA has not yet developed general effluent limitations to apply to the occasional deposit of ordnance into coastal waters, and military needs preclude awaiting the development of particularized limitations pursuant to Section 402 (33 U.S.C. 1342), the non-existence of any applicable standards would probably satisfy that requirement in this case.

Finally, the reliance of the court below on the possibility of an exemption shifts the burden of devising an equitable and practical remedial program from the courts to the Office of the President. Exemptions, of course, may be unconditional; such exemptions may, however, unnecessarily delay federal agency compliance with the requirements of the Clean Water Act. If, for that reason, the Office of the President conditions an exemption on compliance with remedial action, it will in effect be formulating an equitable decree to satisfy the purposes and policies of the Clean Water Act. It is the role of the courts to fashion appropriate equitable relief for violations of federal law. The federal courts should not abdicate that responsibility and shift it to the Office of the President in the absence of a clear congressional direction to do so.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

WADE H. MCCREE
Solicitor General

ANTHONY C. LIOTTA
Acting Assistant Attorney General

EDWARD J. SHAWAKER
ANNE S. ALMY
Attorneys

MAY 1981

Appendix A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 79–1626

CARLOS ROMERO-BARCELO, ETC., ET AL.,
PLAINTIFFS-APPELLANTS,

v.

HAROLD BROWN, ET AL.,
DEFENDANTS-APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[HON. JUAN R. TORRUELLA, U.S. *District Judge*]
(478 F. Supp. 646)

Before COFFIN, *Chief Judge*,
CAMPBELL AND BOWNES, *Circuit Judges*.

January 26, 1981

BOWNES, *Circuit Judge*. The Commonwealth of Puerto Rico appeals from the district court's denial of its request for a comprehensive injunction against the United States Navy's military training operations on the Island of Vieques, a municipality of the Commonwealth. Armed with a battery of federal and state laws, Puerto Rico[1] alleged

[1] Appellants—Governor Carlos Romero-Barcelo on behalf of the Commonwealth of Puerto Rico; Radames Tirado Guevara, Mayor of Vieques; and the Board on Environmental Quality—are hereinafter collectively referred to either as Puerto Rico or the Commonwealth.

that the Navy's[2] activities in and around Vieques cause irreparable injury to the island's ecology and its inhabitants. More specifically, Puerto Rico claims that the Navy's operations pollute the island's air and its coastal waters, threaten the habitats of endangered species and many of the island's irreplaceable historical sites, and diminish the productivity of the island's fishing and agricultural resources. The Commonwealth also claimed that the Navy transferred certain training activities from the island of Culebra to Vieques, contrary to congressional and executive directives. After an extensive trial, the district court ordered the Navy to obtain a NPDES permit, prepare an environmental impact statement and obtain a determination on the eligibility of certain historical and prehistoric sites on the island for inclusion in the National Register of Historic Places. The court otherwise ruled in the Navy's favor and refused to enjoin the training operations. *Barcelo* v. *Brown*, 478 F. Supp. 646 (D.P.R. 1979). Before turning to the issues raised by Puerto Rico on appeal, we briefly sketch some basic characteristics of the island and the Navy's activities.

VIEQUES

The island of Vieques lies six miles off the southeastern coast of Puerto Rico and approximately nine miles directly south of the island of Culebra. Situated on an east-west axis, Vieques is nearly twenty miles long with an average width of four miles. Of total area of approximately 33,000 acres, the Navy owns 25,231.72 acres, or slightly more than 76% of the island.

Certain features of the island's ecology deserve particular mention. Fringe and offshore coral reefs are found in the coastal waters of Vieques, primarily off the northern,

---

[2] Appellees—Harold Brown, Secretary of Defense; W. Graham Claytor, Jr., Secretary of the Navy; James L. Holloway, Chief of Naval Operations; I.C. Kidd, Jr., Commander in Chief of the Atlantic Fleet; and Louis H. Wilson, Commandant of the Marine Corps—are hereinafter collectively referred to as the Navy.

eastern and southern shores. Seagrass flourishes along the ocean floor adjacent to the coasts: the largest concentration runs from Punta Caballo on the north coast eastward around Punta Arenas to the southwest coast. There are also several large mangrove stands located along the shores: in the west near Punta Arenas and in the south around Puerto Mosquito, Puerto Ferro and Ensenada Honda. Three of the seven bioluminescent bays known to exist in the world are located along the southern coast—Puerto Mosquito, Puerto Ferro, and Bahia Tapon.

Of the animal species living on Vieques, six are designated by the U.S. Fish and Wildlife Service as either "endangered" of "threatened." 50 C.F.R. § 17.11. The "endangered" are the manatees, the brown pelicans, the leatherback turtles and the hawksbill turtles. Considered "threatened" are the green turtles and the loggerhead turtles. At least some of the nesting sites favored by the pelicans and the turtles are located within the areas where the Navy conducts its training operations.

The human history of the island dates back at least to the ninth century A.D.[3] At that time, Vieques served as a transit stop in the migration of Arawak Indians from the Orinoco Basin in South America (Venezuela) to Puerto Rico and Hispaniola (Haiti and the Dominican Republic). At the time of Columbus' "discovery" of Vieques in 1493, the island was used by the Carib Indians as a temporary base from which they carried out raids against the people of Puerto Rico. Spain's movement into the Caribbean during the sixteenth century resulted in the first permanent habitation of Vieques by Indians who sought to escape the Spanish occupation of Puerto Rico and St. Croix. Although Spain apparently never attempted to colonize Vieques, it periodically sent military expeditions to the island throughout the seventeenth and eighteenth centuries to maintain its hegemony over the island.

The early years of the nineteenth century mark the beginning of Vieques' modern history. In 1816 colonists from

[3] Inconclusive archeological evidence suggests the presence of a preceramic Indian culture as early as the second century A.D.

St. Croix and St. Thomas established the first livestock ranches, thus beginning what is today the island's primary agricultural activity. Soon thereafter, one of the colonists organized the construction of a fort at Isabel Segunda. In addition to ranching, the economy of Vieques at this time involved timber harvesting for export to the Virgin Islands, subsistence farming and fishing. By the second half of the century, sugar cane had become the leading cash crop.

After the Spanish American War of 1898, Vieques, together with the rest of Puerto Rico, became a Territory of the United States. The island's economy continued to be dominated through the early 1940's by sugar cane cultivation, ranching, and fishing. Since the mid 1940's, however, the sugar cane industry has declined to a point where it is of no current importance to the island. Thus, the islanders now derive their livelihood from the same sources relied upon by their ancestors more than one hundred fifty years ago—fishing, subsistence farming and ranching.

During the early 1940's the Navy acquired title to most of its present holdings on Vieques. As a result of these acquisitions, civilians now occupy an area of about 7,000 acres, bounded on both the east and the west by Navy property.[4] The present population distribution reflects the island's economy. Of a total population of approximately 8,000, close to 5,000 people live in a rural environment outside the two coastal towns. Located on the northern coast of the civilian sector is the capital, Isabel Segunda, which has between 2,400 and 2,500 inhabitants. Esperanza, the island's other town, located on the southern coast, has a population of approximately 600.

NAVY OPERATIONS ON VIEQUES

The Naval Ammunition Facility (NAF) encompasses the entire area of Vieques west of the civilian zone. The Navy

---

[4] At the time of trial, the Navy also owned a small parcel within the civilian sector. It has since been conveyed to the Commonwealth of Puerto Rico.

uses the facility for deep storage of conventional ammunition. Ships delivering the ordnance[5] dock at Mosquito Pier, located on the northern coast of the NAF. From there, it is transported by truck to bunkers distributed throughout the NAF. Most of the ammunition is destined for off-island use by the Navy, the Marines and the Puerto Rican National Guard. Occasionally, ammunition is transferred overland from the NAF to the ground maneuver area located east of the civilian zone.

The Navy's installations on the eastern half of Vieques are part of a large military complex known as the Atlantic Fleet Weapons Training Facility, headquartered at Roosevelt Roads Naval Station in Ceiba, Puerto Rico. The facility consists of four firing ranges of which only two are related to Vieques. The outer range, a large area of ocean, at its closest points to Vieques lies thirty-five miles to the north and twenty miles to the south. Within this range, the Navy conducts exercises in ship to ship weapons fire, ship to air missile fire and air to air weapons fire. The underwater range, located off the western shore of St. Croix, involves training in three dimensional tracking of surface and underwater objects. The electronic warfare range is a network of "threat platform" simulators located in Puerto Rico and nearby islands. These are used to train shipboard and airborne electronic warfare teams and provide tactical electronic order of battle support for operations conducted on the other ranges. One simulator is positioned at the western end of Vieques atop Monte Pirata. Until recently, the inner range consisted of air to ground bomb and missile targets and naval gunfire support targets on Culebra, and air to ground, artillery and naval gunfire support targets on Vieques. In 1975, however, the Navy ceased its Culebra operations. Thus, the Vieques installations now comprise the entire inner range.

---

[5] Both the parties and the district court refer to "ammunition" and "ordnance" interchangeably. Although we accept this usage for purposes of this case, it is our understanding that "ordnance" includes weapons as well as ammunition.

The inner range is divided into four distinct areas. The ground maneuver area (GMA) extends from the civilian sector eastward for approximately seven miles to a cattle fence which runs the width of the island. Located at the southwestern corner of the GMA is Camp Garcia, a Marine Corps camp which, although able to accommodate several thousand troops, is occupied by one marine. The principal use of the GMA is for Marine amphibious landings. These are conducted throughout the year, primarily on the southern beaches between Punta Conejo and Punta Negra. A typical landing will require the use of large attack transports from which are launched the landing craft and amphibious tracked vehicles. These smaller craft carry troops, tanks and other equipment to the beaches. Once landed, the troops perform maneuvers throughout the GMA, which at times include artillery fire. Upon completion of the land exercise the troops embark from the beaches and return to the attack transports. An amphibious landing usually is accompanied by low-level support flights by fixed wing jet aircraft and helicopter gunships. An amphibious exercise may involve anywhere from two to twenty thousand troops; it may be independent of other inner range operations, or it may be part of a single large-scale maneuver in concert with the Navy's sea and air forces.

The surface impact area (SIA) begins about one mile east of the cattle fence and extends approximately two and one-half miles east to a "firebreak" designated as the western friendly front line. Artillery training, strafing and air to ground bombing, the latter two using inert ammunition only, occur within this area. The artillery is positioned near the western border of the SIA—about six miles from the nearest point in the civilian zone—loaded with live ammunition and fired at targets located in the eastern part of the SIA. Air to ground bombing is directed at two bullseye targets. Target #2 is situated about one-half mile east of the SIA's western boundary; target #1 is on a point along the northern half of the western friendly front line. The strafing targets are located at the southern most point of the firebreak.

The Air Impact Area (AIA), also known as the Close Air Support Zone (CAS), runs from the western friendly front line eastward for about two miles to the eastern friendly front line. This area, in which live ammunition is used, contains as targets mockups of two surface to air missile sites, an airstrip, a fuel farm and an ammunition dump. There are also two remote controlled moving targets inland and six naval gunfire support targets along the southern coast of the AIA. No targets exist in the area between the eastern friendly front line and Punta Este, the easternmost point of Vieques. An infrequently used water target lies about one mile east of this point.

Air and sea operations in the inner range occur about 200 days out of a year, usually between 7:30 a.m. and 10:00 p.m. Operations are directed by observers positioned in an observation post on Cerro Matias, located in the southeastern part of the SIA. Aircraft taking off from the Roosevelt Roads airfield or a carrier located north of Vieques first fly north of Vieques and then circle around the eastern coast to approach the range from the south. Aircraft taking off from carriers located south of Vieques use a straight approach from that direction. Any aircraft carrying ammunition, whether live or inert, is prohibited from flying over the civilian area. As best as can be estimated, an aircraft training in the range would ordinarily come no closer than within five and three-quarters miles of the civilian zone.

Ship to shore gunnery directed at the naval gunfire support targets in the AIA is also restricted to a southern approach. When firing, the ships are usually positioned between three and eleven miles off the southern shore of the AIA. All ship to shore firing occurs within a designated danger zone, which permits the Navy to prohibit all civilian navigation while the area is in use.

THE ISSUES ON APPEAL

Puerto Rico challenges the district court's rulings on the following issues:[6]

---

[6]The Navy did not appeal the district court's order requiring the Navy to obtain a NPDES sewage discharge permit, prepare an

1. Did the Navy "transfer" training activities from Culebra to Vieques in violation of certain Military Construction Authorization Acts?

2. Does the dropping of ordnance into the coastal waters of Vieques violate the Puerto Rico Water Quality Standards, contrary to the requirements of § 313 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1323(a)?

3. Did Congress intend to permit a private cause of action to enforce § 13 and § 15 of the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 407, 409?

4. Does the danger zone regulation promulgated by the Corps of Engineers, 33 C.F.R. § 204.234, unreasonably restrict the food fishing industry of Vieques contrary to 33 U.S.C. § 3?

5. Do the Navy's training activities generate such noise as to create a public nuisance in violation of Puerto Rico's criminal nuisance statute, P.R. Laws Ann. tit. 33, § 1365, and the requirements of § 4 of the Noise Control Act, 42 U.S.C. § 4903(a)?

6. Do the Navy's activities on Vieques violate the Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1543?

7. Does the Navy's survey of historical sites on Vieques satisfy the requirements of § 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, Executive Order 11593 and 36 C.F.R. § 800.4?

8. Should the Navy be enjoined from conducting training operations on Vieques?

After oral argument, we requested that the parties submit supplemental briefs on the question of whether any of the plaintiffs have a right of action to challenge the alleged violations of certain military authorization acts and executive branch directives related to training activities on

---

environmental impact statement and obtain a determination on the eligibility of certain historical and prehistorical sites for inclusion in the National Register of Historic Places.

Culebra and Vieques. With the benefit of briefs from both parties, we first address that question.[7]

RIGHT TO CHALLENGE THE ALLEGED TRANSFER OF MILITARY TRAINING ACTIVITIES

Puerto Rico alleged that the Navy "clandestinely" has transferred training operations from Culebra to Vieques, contrary to the "clear command" of the Military Construction Authorization Acts of 1971, 1972 and 1974. The district court rejected this contention, ruling that the statutes do not establish an enforceable mandate, and expressed serious doubt that a transfer of activities actually had occurred. On appeal, Puerto Rico argues that the trial court's narrow view of the acts ignores Congress' "carefully crafted" statutory "procedure" intended to protect the interests of the Commonwealth; Puerto Rico also challenges the court's finding that a transfer did not in fact occur. Our initial task is to ascertain whether Congress intended to permit the Commonwealth,[8] or any other party, to seek judicial en-

---

[7] Because we understand the district court's decision on this question to include a determination that Puerto Rico had failed to state a claim upon which relief can be granted, we reject the Commonwealth's contention that the issue is not properly before us. The Navy raised this issue in its answer and the district court ruled, *inter alia*, that Puerto Rico had failed to establish the existence of a judicially enforceable mandate. 478 F. Supp. at 697–700.

[8] Although the Commonwealth's standing as parens patriae in an action against the Navy may be questioned, *compare Commonwealth of Pennsylvania* v. *Kleppe*, 533 F.2d 668 (D.C. Cir. 1976) *with Washington Utilities & Transp. Comm'n* v. *F.C.C.*, 513 F.2d 1142 (9th Cir. 1975), we think the Commonwealth certainly has standing to raise this issue on the basis of the alleged injuries to its quasi-sovereign interest "in all the earth and air within its domain," an interest that is "independent of and behind the titles of its citizens . . . ." *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237 (1907). *Cf. Massachusetts* v. *Mellon*, 262 U.S. 447, 482 (1923) (acknowledging the distinction between a state's quasi-sovereign interest in the environment and its status as parens patriae). *See also Missouri* v. *Holland*, 252 U.S. 416, 431 (1920). Because we conclude that Puerto Rico has alleged "a 'distinct and palpable injury' . . . 'fairly traceable' . . . to the challenged conduct" of the Navy, *Duke Power Co.* v. *Carolina Env. Study Group*, 438 U.S. 59, 73 (1978) (citations omitted), we need not decide

forcement of the three authorization acts. As with any question of statutory interpetation, we begin with an examination of the language of the statutes and the related executive branch directives. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 16 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568 (1979).

In October 1970 Congress adopted the Military Construction Authorization Act of 1971, Pub. L. No. 91–511, 84 Stat. 1204. Section 611(a) of the Act directed the Secretary of Defense "to prepare a report of the weapons training now being conducted in the Culebra complex . . . ." The Secretary was ordered to evaluate "all possible alternatives, geographical and technological," and make "recommendations for . . . moving all or part of such activities to a new site or sites," giving particular consideration to six factors:

> (1) the safety and well-being of the people who live on Culebra;
>
> (2) the natural and physical environment of Culebra and adjoining cays and their recreational value;
>
> (3) the development of a sound, stable economy in Culebra;
>
> (4) the unique political relationship of Culebra and Puerto Rico to the United States;
>
> (5) the operational readiness and proficiency of the Atlantic Fleet; and
>
> (6) national security.

Section 611(b) provided that the report was to be prepared in consultation "with the people of Culebra, the Government of Puerto Rico, and all appropriate federal agencies." Finally, the Navy was directed to "avoid any increase or expansion of the present weapons range activities in the Culebra complex and, wherever possible, without degrading the activities, to institute procedures which will mini-

---

whether the Mayor of Vieques or the Board on Environmental Quality have standing to litigate this case. *See Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 263–64 (1977).

mize interference with the normal activities and the solitude of the people of Culebra."[9]

On April 1, 1971, Secretary of Defense Laird transmitted to Congress and the President the mandated report. In a press release issued the same day, the Secretary announced that he had ordered the Navy "to institute immediately a number of actions which will enhance the safety and well being of the residents of Culebra and reduce the irritants to them resulting from Navy training." The Secretary also expressed his intention to reappraise the situation by the end of 1972 and make a final decision about where to relocate the Culebra operations.

With the enactment in 1971 of § 207 of the Military Construction Authorization Act of 1972, Pub. L. No. 92–145, 85 Stat. 394, Congress directed the Secretary of Defense to prepare a new study of "the most advantageous alternative [to the Culebra training complex] on the basis of investigations which consider cost, national security, the operational readiness and proficiency of the Atlantic Fleet, the impact on the environment, and other relevant factors." On December 27, 1972, Secretary Laird submitted his report and recommendations to the President and Congress. In an accompanying letter he identified Vieques as the best of the available alternative sites but concluded "that the Culebra complex offers such advantages over all other alternatives studied that none of these other alternatives can be considered reasonable." Relocation to Vieques "would significantly reduce the capability of the Inner Range and would transfer the training activity from an island with 700 inhabitants to one with 7,000 inhabitants," an "[im]prudent course of action." Thus, he recommended "that the Navy retain its training targets in the Culebra complex," yet "remain abreast of developments that would modify . . . the Navy's need" for the Culebra range.

---

[9]On January 11, 1971, the Navy entered into an agreement with the Government of Puerto Rico which imposed certain restrictions on the Culebra operations and also contained the Navy's assurance that it would "continue to investigate both technological and geographical alternatives to the training done around Culebra."

In the following spring of 1973, Secretary Laird's successor, Elliot Richardson, informed the Secretary of the Navy that it was in the Defense Department's long-range interests to transfer the Culebra training activities to the islands of Desecheo and Monito by July 1, 1975. This relocation was to occur, however, only after Congress had appropriated the necessary funds and the Navy had achieved a "satisfactory overall arrangement with the government of Puerto Rico for carrying out the proposed move and for insuring the long-term continuation of the Atlantic Fleet Weapons Range and the Fleet Marine Force training area."

Congress responded to this change in the Defense Department's position with the enactment in 1973 of the Military Construction Authorization Act of 1974. Pub. L. No. 93–166, 87 Stat. 668. Section 204(a) of the Act authorized the appropriation of $12,000,000 to facilitate the relocation of the Culebra training operations. But § 204(b) "expressly conditioned [the relocation] upon the conclusion of a satisfactory agreement to be negotiated by the Secretary of the Navy . . . with the Commonwealth of Puerto Rico and reported to the Committees on Armed Services of the Senate and the House of Representatives prior to execution of such agreement." Congress directed that "the agreement shall provide, among other things, that the Commonwealth of Puerto Rico shall insure that (1) Commonwealth lands suitable for carrying out operations of the type referred to in subsection (a) will be made available for the long-term continued use of the Atlantic Fleet Weapons Range and Fleet Marine Forces training areas by the Navy, including, but not limited to, present areas and facilities on the island of Vieques . . . ."

Despite the absence of an agreement between the Navy and Puerto Rico, on June 22, 1974, Secretary of State Kissinger, acting as National Security Adviser, informed the Secretary of Defense of the president's decision to terminate the training activities on Culebra by July 1, 1975, and those on the Culebra Cays by December 31, 1975. Kissinger directed the Secretary of Defense "to consider and select alternative sites for the weapons range activi-

ties" and stated that "[t]he selection of the new site, if it is in Puerto Rico, will be contingent on its being acceptable to the Commonwealth . . . ." The Navy has ceased its operations on Culebra and negotiations continue over the selection of a new site.

When Congress has not expressly provided for the private enforcement of a statute, there is little likelihood that the legislative history will disclose whether Congress nonetheless intended that result. *Cannon* v. *University of Chicago*, 441 U.S. 677, 694 (1979). Thus, the statutory language becomes the best evidence of Congress' intent. As the Supreme Court recently recognized, in each of its earlier cases that did imply a private cause of action the statute in question either conferred a federal right on private parties or proscribed certain conduct. *Touche Ross & Co.* v. *Redington*, 442 U.S. at 569. Implicit in this observation is that the absence of statutory language that either prohibits some action or confers rights weighs heavily against implication of a private cause of action.

Neither the Military Construction Authorization Act of 1971 nor the 1972 Act creates rights or proscribes conduct of any relevance to this case. The 1971 Act's partial restriction of the Navy's activities in Culebra was unrelated to Navy operations on the other islands of the Commonwealth. In contrast, the 1974 Act made the relocation of the Navy's Culebra operations contingent on the execution of an agreement between the Navy and Puerto Rico. But even if we characterize this as a limited prohibition,[10] it appears from the language of the pertinent provision and the accompanying committee report that the condition was imposed to benefit the Navy rather than Puerto Rico. Section 204(b)

---

[10] Congress' requirement of an agreement prior to relocation was effectively a prohibition only with respect to the expenditure of the $12,000,000. Without mention of the 1974 Act, President Nixon subsequently ordered the termination of the Culebra operations, ignoring the safeguards required by the Act. The Navy never expended the $12,000,000 appropriation and the Congress eventually reallocated the amount to a Navy construction project in the Indian Ocean area. *See* Supplemental Appropriation and Recission Act, Pub. L. No. 96-304, 94 Stat. 857 (July 8, 1980).

required that the agreement contain assurances from the Commonwealth "that Commonwealth lands suitable for carrying out operations . . . will be made availabe for the long term continued use of the . . . Navy, including, but not limited to, present areas and facilities on the island of Vieques . . . ." Not only does this language impose an obligation on the Commonwealth rather than the Navy, but it forecloses negotiation over the training areas and facilities on Vieques. In the same vein, the joint conference report that accompanied the final draft of the Act states:

> The restrictive language in Section 204 is a result of discussion with the Governor and others and the conferees believe it provides sufficient protection to the Navy upon relocation of ship-to-shore gunfire operations from Culebra to the other Islands mentioned.

H.R. Rep. No. 634, 93d Cong., 1st Sess. 35 (1973). If Congress had intended to create a private right of action, it would have provided first for a right or duty upon which private enforcement could be based. But the authorization acts leave Puerto Rico without a place to hang its hat; the statutes grant no right to the Commonwealth, nor do they impose an obligation on the Navy for the benefit of the Commonwealth.

Puerto Rico argues that the authorization acts reflect Congress' intention to obligate the Navy to confer with other parties, particularly the Commonwealth, prior to any transfer of the Culebra operations. As part of that argument, Puerto Rico maintains that Congress anticipated that the agreement mandated by the 1974 Act would provide for "other things" beyond the Commonwealth's assurances of an adequate alternative site. The Commonwealth contends that this phrase undoubtedly was intended to encompass provisions for the protection of its environment and the welfare of its citizens; Congress impliedly sought to prevent a recurrence of the ecological and political problems created by the Navy's use of Culebra. Puerto Rico concludes that as the party most to be benefitted from this inferred congressional prohibition of unilateral Navy action, it must be granted a cause of action to vindicate Congress' intent.

Other than the phrase "among other things," however, Puerto Rico is unable to direct us to one provision in any of the three acts that establishes the mandate it seeks to enforce. Instead, it relies primarily on the "necessary" inferences to be drawn from the statutes and the executive branch directives; Puerto Rico interprets the latter documents to corroborate its position. But the expansive inferences drawn by Puerto Rico, which we do not find to be free from doubt, must be contrasted with the limited nature of the legislation. The 1971 Act and the 1972 Act, as related to Vieques, directed the Secretary of Defense to prepare two feasibility reports; that is all. The 1974 Act did mandate execution of an agreement prior to relocation from Culebra. So far as the statute provides, however, we know only that Congress intended by this condition to protect the Navy's training capacity. Congress may have had a clear collective understanding of what "other things" were at issue, and the preferred resolution, but it chose not to reflect this in its 1974 legislation. Instead, it left to the parties the task of hashing out an agreement, subject to congressional, not judicial, review. The absence of any enforcement scheme in the authorization acts reinforces our conclusion that Congress intended that the controversy surrounding the Navy's training activities in Puerto Rico be resolved in the political sphere. Implication of a private cause of action would be contrary to the apparent intent of Congress, and, given the lack of a judicially enforceable mandate, a futile gesture.

Puerto Rico relies on the various executive branch directives principally to corroborate its interpretation of the authorization acts. As a second line of argument, however, it maintains that the directives have independent significance as sources of a private right of action. Unlike the situation presented by the three statutes, at least one of the directives contains a provision which ordered the Navy to obtain the Commonwealth's agreement prior to a relocation of the Culebra operations. In 1974 National Security Adviser Kissinger, on behalf of the President, directed the Secretary of Defense to end the Culebra operations and select a new site contingent on its being acceptable to the Common-

wealth. Puerto Rico contends that this order imposed a legal obligation on the Navy that is enforceable by the Commonwealth. We conclude, however, that the President's order does not have the force and effect of law and thus is not enforceable by an implied private cause of action.

The Commonwealth attempts to cloak the 1974 presidential order with statutory authority, characterizing it as in furtherance of the 1974 Act. But in fact the order essentially ignored what we perceive to be the intent of Congress as evidenced in the Act. Rather than require the Commonwealth to insure alternative sites prior to a relocation of the Culebra operations, as Congress mandated, the President ordered termination of those operations without any prior assurances from Puerto Rico. Moreover, the order granted the Commonwealth a veto over the Navy's choice of an alternative site; nothing in the Act suggests that Congress intended such a role for the Commonwealth. When the President issued this order, he necessarily relied not on any statutory authority, but on his constitutional authority as the chief executive and the commander in chief of the armed forces. As such, the President has the power to direct the activities of the military but he is without the authority to legislate. *See Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 578, 587–88 (1952). Without some basis in an act of Congress, the directive cannot constitutionally be invested with the status of law, *see Independent Meat Packers Ass'n* v. *Butz*, 526 F.2d 228, 234–36 (8th Cir. 1975), thus obviating a decision on the question of an implied cause of action.[11]

---

[11] The other executive branch directives invoked by Puerto Rico do not require extensive comment. The statements of Secretary Laird, to the extent they pertain to Vieques, contain nothing more than certain recommendations based on the Department's evaluation of the island and the other potential relocation sites. Secretary Richardson's memorandum to the Secretary of the Navy does not address the transfer of Culebra operations to Vieques. He ordered relocation to the uninhabited islands of Desecheo and Monito and required the Commonwealth's participation only with respect to the implementation of the

The Commonwealth's reliance on section 10 of the Administrative Procedure Act as an alternative source for a cause of action founders upon the limitations inherent in the Act. Section 10(a) of the APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. But assuming that the Navy did "transfer" the Culebra activities to Vieques, that action is not "agency action."

Section 2 of the APA defines agency action to include "the whole or a part of an agency rule, order, license, sanction, relief or the equivalent or denial thereof, or failure to act . . . ." *Id.* § 551(13). Each of the types of action included within this definition is separately defined in § 2. *See id.* § 551(4), (6), (8), (10), (11). All but one of these specific definitions refer to one of two forms of regulatory activity—agency rulemaking or agency adjudication. "Sanction" is defined to include, in addition to regulatory activity, "any agency . . . destruction, taking, seizure or withholding of property." *Id.* § 551(10).

The Navy's transfer of military training activities did not remotely involve rulemaking or adjudication, nor, at least in this case, did it result in the "destruction, taking, seizure or withholding of property." We recognize that Congress intended the APA to span a "broad spectrum of administrative actions." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967). Nonetheless, the language of § 2 evidences that Congress intended to reach only actions that are administrative, and we conclude that the challenged activities of the Navy do not fall within that spectrum. *But see Standard Oil Co. of Ca.* v. *F.T.C.*, 596 F.2d 1381, 1384–85 (9th Cir. 1979).

Even if we were to accept that the "transfer" constituted agency action, we would characterize it as action "com-

---

plan and protection of the Atlantic Fleet's interests. Moreover, Richardson's directive was essentially superseded by the President's 1974 order.

mitted to agency discretion by law," 5 U.S.C. § 701(a)(2), and thus unreviewable. This exception to § 10's broad entitlement to judicial review applies only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'"[12] *Citizens to Protect Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971), *quoting* S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945). *See Chrysler Corp.* v. *Brown*, 441 U.S. 281, 317 (1979). The question before us presents one of those rare instances. The Commonwealth has cited as the applicable constraint on the Navy's training activities the Military Construction Authorization Acts of 1971, 1972 and 1974. But, as we have already explained in some detail, those statutes do not provide the judiciary with any "law to apply."*

We affirm the district court's ruling that with respect to the alleged transfer of military training activities from Culebra to Vieques, Puerto Rico has failed to state a claim upon which relief can be granted.

POLLUTION OF THE COASTAL WATERS

1. Puerto Rico Water Quality Standards

Section 313 of the Federal Water Pollution Control Act Amendments subjects every "department, agency, or instrumentality of the executive, legislative and judicial branches of the Federal Government" to "all Federal,

---

[12] Because we conclude that the authorization acts are of no relevance to the Navy's authority to conduct the Vieques operations, we need not undertake the more detailed analysis set forth in *Hahn* v. *Gottlieb*, 430 F.2d 1243, 1249 (1st Cir. 1970), to determine the applicability of the "committed to agency discretion" exception of 5 U.S.C. § 701(a)(2). *Cf. Carter v. Colon*, No. 80-1666, et al., slip op. at 4-6 (1st Cir. Oct. 24, 1980) (recent application of the *Hahn* analysis).

* Our conclusion that the authorization acts do not impose a duty on the Navy to the benefit of the Commonwealth also undermines the Commonwealth's reliance on 28 U.S.C. § 1361. That statute grants the "district courts original jurisdiction of any action in the nature of mandamus to compel an officer . . . of the United States . . . to perform a duty owed to the plaintiff." *Id. See Falzarano* v. *United States*, 607 F.2d 506, 513 (1st Cir. 1979).

State, interstate, and local requirements . . . respecting the control and abatement of water pollution in the same manner and to the same extent as any nongovernmental entity." 33 U.S.C. § 1323(a). Puerto Rico alleged that the Navy, by dropping ordnance into the waters of Vieques, has violated several water pollution control regulations promulgated pursuant to the Commonwealth's Water Pollution Control[13] and Public Policy Environmental Control Acts.[14] The district court rejected this allegation, finding no violation of the water quality standards it deemed applicable to the Navy's activity. 478 F. Supp. at 664–69. On appeal, Puerto Rico asserts that, contrary to the trial court's opinion, there are three germane water quality standards that the Navy has violated.[15] We consider each separately.[16]

Article 2.1.1 of the Puerto Rico Water Quality Standards[17] provides:

> The waters of Puerto Rico shall not contain materials attributable to discharges that will settle to form objectionable deposits. Nor will they contain floating debris, scum, oil and other floating materials attributable to discharges in amounts sufficient to be unsightly or deleterious.

Puerto Rico argues that the trial court erred in its interpretation of 2.1.1 by according determinative significance to the term "discharges," contrary to the purposes of

---

[13] P.R. Laws Ann. tit. 24, §§ 591–601.

[14] P.R. Laws Ann. tit. 12, §§ 1128–1142.

[15] Puerto Rico's reliance on the SB waters classification's prohibition of solids is misplaced. This prohibition of solids was part of the pre-1970 regulations, 24 P.R.R. & R. 598–5(a)(A) & (B), and has been superseded by Article 7.3 of the current Regulation, "Puerto Rico Water Quality Standards."

[16] We undertake this examination of the water quality standards without the benefit of any prior judicial or administrative interpretation.

[17] The "Puerto Rico Water Quality Standards" are designated as a single "Regulation." Each section of the Regulation is denoted an "Article." The Regulation is reprinted in Envir. Rep.—State Water Laws (BNA) 896:0301—: 0310.

the regulations and statute. We cannot agree. Article 2.1.1 expressly and exclusively addresses materials "attributable to discharges," which are defined as "[t]he outflow of wastewater from any . . . source into receiving waters." Article 1. Turning to the definition of wastewater, we are directed to the definition of municipal wastes, which is "[w]ater carrying human and animal wastes from homes, buildings, industrial establishments and other places alone or in combination with industrial wastes." *Id.* No fair reading of this language warrants the conclusion that Article 2.1.1. applies to the bombing and shelling of coastal waters.

In contrast, the prohibitions annunciated in Article 2.1.3 are not limited in application to materials attributable to discharge. Article 2.1.3 directs that "[t]he waters of Puerto Rico shall not contain substances in concentrations or combinations which produce undesirable physiological responses in human, fish, or other animal life, and plants." More specifically, subsection (A) establishes with respect to the coastal waters the "maximum allowable concentrations" of iron and certain other inorganic substances. Puerto Rico contends that the district court ignored the general prohibition of "substances . . . which produce undesirable physiological responses" and erred in its finding that the Navy's activity did not result in a violation of the maximum allowable concentration of iron.

The weakness in Puerto Rico's first contention is that it reads into Article 2.1.3 an unjustifiable breadth in scope. Article 2.1.3 speaks not simply of "substances," which, admittedly, could be construed to encompass solids such as spent ordnance as well as other refuse. Rather, the regulation addresses "concentrations" or "combinations" of substances. Those terms appear to refer in this context to the presence of chemicals and chemical processes rather than that of solids such as discarded ordnance. For example, the "maximum allowable concentrations" established by 2.1.3 are expressed in terms of milligrams per liter, hardly a measurement appropriate to shell casings or bomb remnants. And those limitations are devoted to the specification of allowable concentrations of minerals and pesticides, not those of solids. We conclude that the apparent thrust of

this regulation is the control and abatement of chemical pollution. We therefore agree with the district court that the sole issue under Article 2.1.3 is whether the Navy's used ammunition caused concentrations of iron in certain areas of the coastal waters to exceed the specified maximum allowable concentration.

With respect to this question, we find nothing in the record to contradict the trial court's finding. Although it appears fairly clear that the concentrations of iron in some areas near the target range do exceed the Article 2.1.3(A) standard, Puerto Rico failed to establish that ordnance dropped by the Navy caused these excessive concentrations of iron. Thus, the district court correctly found no violation of Article 2.1.3.

Finally, we turn to the broadly phrased prohibition of Article 4 of the Water Quality Standards, Article 4.1.1 provides that "[n]o person shall cause or permit the pollution of the waters of Puerto Rico . . . ." Pollution is defined in Article 1 as

> [a]ltering the natural characteristics of a body of water so as to make it in any way harmful or noxious to human health, or to that of animals, plants, or rendering it ill-smelling or impure or altering adversely its physical, chemical, microbiological or radioactive condition, in such a way as to interfere with enjoyment of life or property or violate the standards of purity established by this Regulation.

Puerto Rico argues that the district court failed to apply Article 4.1.1 as a "generic" prohibition distinct from the specific standards set forth in Article 2. We conclude, however, that Article 4.1.1 does not constitute a "standard" as referred to in Puerto Rico's Water Pollution Control Act.

The statutory prohibition of pollution makes it "unlawful for any person . . . to throw, discharge, pour or dump . . . into the waters . . . any organic or inorganic matter capable of polluting" these waters "in such a manner as to place them out of the minimum standards of purity that the [Board on Environmental Quality] may establish . . . ." P.R. Laws Ann. tit. 24, § 595. Similarly, the statute defines pollution as "making [the waters] in any way noxious

. . . all according to the permissible standards of purity . . . established as provided herein." P.R. Laws Ann. tit. 24, § 591(i). This language evidences the legislature's judgment that the general prohibition of pollution is not enough; standards explicating what pollution is must be provided. The statute anticipates administrative specifications of its broad proscription in the form of standards by which particular actions may be evaluated. But Article 4.1.1 merely rephrases the general statutory command; it offers no clarification of that language, nor, unlike Article 2, does it provide any additional guidance to those who must conform to the law. To accept 4.1.1 as a "standard" would render meaningless the statutory requirement that the regulations promulgated thereunder further define and clarify the general statutory proscription of pollution. Because Article 4.1.1 is not a standard as contemplated by the authorizing statute, we decline to give it effect separate from the actual standards of the Regulation.[18]

We affirm the district court's conclusion that the Navy has not violated the applicable Puerto Rico Water Quality Standards or 33 U.S.C. § 1323(a).

2. The Rivers and Harbors Act of 1899

The second phase of Puerto Rico's attempt to halt the Navy's dropping of ordnance into the coastal waters of Vieques rests primarily on an alleged violation of Section 13 of the Rivers and Harbors Act of 1899. 33 U.S.C. § 407. As a complement to that claim, Puerto Rico alleged that the Navy's sinking of the U.S.S. Killen in the Bahia Salinas del Sur violated Section 15 of the same act. 33 U.S.C. § 409. The district court ruled that neither § 13 nor § 15 give rise to a private cause of action for injunctive relief. 478 F. Supp. at 669–72. We affirm that decision with respect to § 13, but vacate the court's ruling with respect to § 15.

Section 13 makes it unlawful to throw, discharge or deposit "any refuse matter . . . into any navigable water of

---

[18]The statutory provisions that empower the Board to adopt regulations, P.R. Laws Ann. tit. 12. § 1131(13) and tit. 24, §§598, 599, contain nothing contrary to this conclusion.

the United States . . ." without a permit from the Administrator of the Environmental Protection Agency. 33 U.S.C. §§ 407, 1342(a). The "comprehensive language" of this prohibition reflects a broad statutory purpose—the protection of navigation and the prevention of pollution. *United States* v. *Standard Oil Co.*, 384 U.S. 224, 228–30 (1966). *See United States* v. *Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655 (1973). Under § 17 of the Act, it is the duty of the Department of Justice to "conduct the legal proceedings necessary to enforce the provisions" of § 13. 33 U.S.C. § 413. Although the Act expressly provides for criminal penalties only, *id.*, courts have recognized the federal government's implied authority to seek injunctive relief for a violation of § 13. *United States* v. *Stoeco Homes, Inc.*, 498 F.2d 597 (3d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975). *See Wyandotte Transp. Co.* v. *United States*, 389 U.S. 191 (1967); *Connecticut Action Now, Inc.* v. *Roberts Plating Co.*, 457 F.2d 81 (2d Cir. 1972). Puerto Rico argues that the broad purposes of § 13 also warrant the implication of a private cause of action for injunctive relief. We undertake an analysis of this claim mindful of the Supreme Court's recent adherence "to a stricter standard for the implication of private causes of action . . ."[19] *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 578 (1979).

---

[19] None of the courts of appeals that have previously considered this question were willing to imply a private cause of action under § 13. *See National Sea Clammers Ass'n* v. *City of New York*, 616 F.2d 1222 (3d Cir.), *cert. granted*, 49 U.S.L.W. 3281 (Oct. 14, 1980) (No. 79–1760); *Sierra Club* v. *Andrus*, 610 F.2d 581 (9th Cir. 1979) (dictum), *cert. granted sub nom., Kern County Water Agency* v. *Sierra Club*, 49 U.S.L.W. 3212 (Oct. 7, 1980) (No. 79–1502); *City of Evansville, Inc.* v. *Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008 (7th Cir. 1979); *Connecticut Action Now, Inc.* v. *Roberts Plating Co.*, 457 F.2d 81 (2d Cir. 1972 (*qui tam action*); *Guthrie* v. *Alabama By-Products Co.*, 456 F.2d 1294 (5th Cir. 1972) (per curiam), *cert. denied*, 410 U.S. 946 (1973); *Bass Anglers Sportman's Society of America, Inc.* v. *Koppers Co.*, 447 F.2d 1304 (5th Cir. 1971) (per curiam). *See also Parsell* v. *Shell Oil Co.*, 421 F. Supp. 1275 (D. Conn. 1976), *aff'd mem. sub nom. East End Yacht Club, Inc.* v. *Shell Oil Co.*, 573 F.2d 1289 (2d Cir. 1977); *Loveladies Property Owners Ass'n* v. *Raab*, 430 F. Supp. 276 (D.N.J. 1975), *aff'd mem.* 547 F.2d 1162 (3d Cir. 1976), *cert*

The touchstone of this inquiry is whether Congress intended that the statute be enforced by private parties. *Transamerica Mortgage Advisers, Inc.* v. *Lewis*, 444 U.S. 11, 15 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. at 568. That intent usually can best be ascertained by addressing four factors. *See Cort* v. *Ash*, 422 U.S. 66, 78 (1975). First, it must be determined from the statutory language "whether the statute was enacted for the benefit of a special class of which the plaintiff is a member." *Cannon* v. *University of Chicago*, 441 U.S. 677, 689 (1979). The duties imposed by § 13 benefit the public at large: nothing in the statutory language identifies any special class as the principal intended beneficiary.[20] Rather, if there is a principal beneficiary of § 13's proscription, it is the "Government itself." *Wyandotte Transp. Co.* v. *United States*, 389 U.S. at 201. With a statute such as § 13, one which creates "duties on the part of persons for the benefit of the public at large," the Supreme Court "has been especially reluctant to imply causes of actions." *Cannon* v. *University of Chicago*, 441 U.S. at 691–92 n. 13.

The second factor requires an investigation of the legislative history. As the Supreme Court has recognized, however, little is likely to be learned from the legislative history of a statute which is silent on the question of private enforcement. *Id.* at 694. The debates and reports preceding § 13's enactment at most evidence that Congress had no intent with respect to this question. *See Touche Ross & Co.* v. *Redington*, 442 U.S. at 571.

---

denied, 432 U.S. 906 (1977). Although the district court thought that the Fourth circuit may have recognized a private cause of action in *Rucker* v. *Willis*, 484 F.2d 158 (4th Cir. 1973), *River* v. *Richmond Metropolitan Authority*, 481 F.2d 1280 (4th Cir. 1973), and *Lauritzen* v. *Chesapeake Bay Bridge and Tunnel District*, 404 F.2d 1001 (4th Cir. 1968), we do not find those decisions to support that conclusion.

[20] That the Commonwealth of Puerto Rico is one of the plaintiffs in this case does not alter our conclusion. Section 13 "no more evidences an intent to 'especially' benefit a class of [state governments] or their agents than a class of private parties . . . ." *City of Evansville, Ind.* v. *Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1012 n.7 (7th Cir.), *cert. denied*, 444 U.S. 1025 (1979).

The third factor is whether it is "consistent with the underlying purposes of the legislative scheme to imply such a remedy . . . ."[21] 441 U.S. at 688–89 n.9. Section 17 of the Act provides that "[t]he Department of Justice shall conduct the legal proceedings necessary to enforce" § 13. 33 U.S.C. § 413. The only role expressly created for private persons in the enforcement scheme is as informants; section 17 provides for the payment of one-half of a levied fine "to the person or person giving information which shall lead to conviction." *Id.* § 411. In one respect, a private cause of action is clearly consistent with the legislative scheme. It would positively augment the government's enforcement efforts, thus better effectuating the ultimate objectives of § 13. But notwithstanding the remedial advantages to be gained from such implication, the language of these provisions establishes that Congress vested in the federal government the primary responsibility for enforcement.[22] To

---

[21] Later in the *Cannon* opinion the court rephrased this factor as a question of whether "a private remedy . . . would frustrate the underlying purpose of the legislative scheme" and observed that "when that remedy is necessary or at least helpful to the accomplishment of a statutory scheme, the Court is decidedly receptive to its implication . . . ." 441 U.S. at 703. To the extent that this rephrasing weighs more favorably towards implication of a private cause of action, we think it reflects the Court's previous conclusion that the statute at issue was intended to benefit a special class. The potential remedial advantages of an implied cause of action no longer hold the sway they once did, *Touche Ross & Co.* v. *Redington*, 442 U.S. at 578, even when the statute at issue does benefit a special class, *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 15–16, 19–20, 23–24.

[22] Puerto Rico puts great store in the fact that the Department of Justice is obligated to represent federal agencies charged with a violation of the Act and thus is "in no position to enforce the Act" against those same federal agencies. *Natural Resources Defense Council, Inc.* v. *Grant*, 355 F. Supp. 280, 290 (E.D.N.C. 1973). The Commonwealth maintains that a private parties must be allowed to vindicate the public's interest in environmental protection. *Id. See People of the State of Illinois ex rel Scott* v. *Hoffman*, 425 F. Supp. 71 (S.D. Ill. 1977). *See also Sierra Club* v. *Andrus*, 610 F.2d 581, 590–91 (9th Cir. 1979), *cert. granted*, 49 U.S.L.W. 3212 (Oct. 7, 1980) (No. 79–1502). But whether or not this situation presents an insuperable conflict, our responsibility is to ascertain Congress' intent, not to improve upon its enforcement scheme. *Touche Ross & Co.* v. *Redington*, 442 U.S. at 578. Moreover,

the extent that this decision involved factors other than the protection of navigation and the prevention of pollution, implication of a private cause of action could very well frustrate Congress' intent.[23] *See Connecticut Action Now, Inc.* v. *Roberts Plating Co.*, 457 F.2d at 89.

Finally, we must consider "whether implying a federal remedy is inapprorpiate because the subject matter involves an area basically of concern to the States." *Cannon* v. *University of Chicago*, 441 U.S. at 709. The federal interest in navigation and the control of pollution cannot be doubted. Congress' power under the Commerce clause gives that body virtually plenary authority over the navigable waters of the United States. *See, e.g., Gilman* v. *Philadelphia*, 70 U.S. (3 Wall.) 713 (1865); *Gibbons* v.

---

the absence of an implied private cause of action under § 13 does not mean that federal agencies are effectively free to ignore their responsibilities with respect to the control of water pollution. Section 313 of the Federal Water Pollution Control Act Amendments subjects every federal agency to "all Federal, State, interstate, and local requirements . . . respecting the control and abatement of water pollution . . . ." 33 U.S.C. § 1332(a). Under § 505 of the same Act, *id.* § 1365, Puerto Rico may sue to enforce that obligation, as it has done in this case. The similarity in purpose between the Rivers and Harbors Act and the Federal Water Pollution Control Act is reflected in the fact that the permit requirement imposed by § 13 is now implemented by the Administrator of the EPA under § 402 of the Federal Water Pollution Control Act. *See* 33 U.S.C. § 1342(a)(1)(2). Because no issue is presented here in which the substantive requirements of § 13 might differ from those of the Federal Water Pollution Control Act, we need express no view on the availability of a right of private enforcement against federal defendants in a situation in which they did.

[23] Section 17 requires the Department of Justice "to vigorously prosecute all offenders . . . when requested to do so by the Secretary of the Army or by any of the officials hereinafter designated . . . ." 33 U.S.C. § 413. It vests in the appropriate administrative officials, if not also the Attorney General, the discretion to decide whether § 13 should be enforced in a particular case. As a provision for prosecutorial discretion, it reflects a legislative decision to husband the enforcement resources of the federal government, including those of the judiciary. The government's decision not to enforce § 13 against a particular party, perhaps in anticipation of an informal resolution of the matter, could be frustrated by a private party armed with an implied cause of action.

Ogden, 22 U.S. (9 Wheat.) 1 (1824). Since the enactment of the Rivers and Harbors Act in 1899, Congress has expanded federal efforts to control the pollution of navigable waters with the adoption of the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§ 1251–1376. The enactment in 1969 of the National Environmental Policy Act, 42 U.S.C. §§ 4321–4369, underscores the federal commitment to combat pollution. We perceive no federalism-comity problems militating against the implication of a private cause of action under § 13.

Of the four factors we have analyzed to ascertain Congress' intent, only the last clearly favors implication of a private cause of action. Although we recognize the private enforcement of § 13 might be conducive to the protection of navigation and the control of pollution, "[t]he ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme . . . ." *Touche Ross & Co.* v. *Redington*, 442 U.S. at 578. What evidence there is does not warrant a conclusion that Congress intended to create a private cause of action under § 13.[24]

Section 15 of the Rivers and Harbors Act makes it unlawful "to voluntarily, or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels . . . ." 33 U.S.C. § 409. Puerto Rico maintains that the Navy's intentional sinking of a target ship, the U.S.C. Killen, in the Bahia Salinas del Sur, violated this prohibition. We conclude that Puerto Rico is without standing to assert this claim.

---

[24]Two of the decisions relied upon by Puerto Rico rest, in principle if not by name, on an application of § 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702. *See Citizens Committee for Hudson Valley* v. *Volpe*, 425 F.2d 97 (2d Cir.), *cert. denied*, 400 U.S. 949 (1970); *People of the State of Ill. ex rel Scott* v. *Hoffman*, 425 F. Supp. 71 (S.D. Ill. 1977). That statute creates a right to judicial review for persons injured by "agency action," the definition of which does not encompass the Navy's dropping of ordnance into the coastal waters of Vieques. *See* 5 U.S.C. § 551(13). *See* pp. 18–19, *supra*.

"The essence of the standing inquiry is whether" the plaintiff has alleged "a 'distinct and palpable injury' . . . 'fairly traceable' . . . to the challenged conduct." *Duke Power Co.* v. *Carolina Env. Study Group*, 438 U.S. 59, 73 (1978) (citations omitted). Puerto Rico failed to allege that the sinking of the U.S.S. Killen resulted in any form of harm to the island or its inhabitants. Nor does the relief requested—an injunction against the Navy's training activities on Vieques—implicitly suggest the harm which Puerto Rico might have alleged. An injunction against current Navy activities hardly would remedy any injury to the environment or navigation caused by a sunken vessel. Removal of the ship would be the appropriate remedy for harm resulting from the ship's presence, but Puerto Rico did not request that relief.[25] The failure to allege a distinct and palpable injury renders Puerto Rico's claim under § 15 nonjusticiable. *See Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 39 (1976); *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 (1973). Thus we vacate the district court's decision with respect to this claim, and remand with instructions to dismiss for lack of jurisdiction.[26]

RESTRICTIONS ON FISHING

"In the interest of the national defense, and for the better protection of life and property," section 1 of the Army Appropriation Act of 1918 authorizes the Secretary of the Army "to prescribe such regulations as he may deem best for the use and navigation of any portion or area of the navigable waters . . . under the jurisdiction of the United States endangered or likely to be endangered by Artillery

---

[25] Puerto Rico correctly argues that a violation of § 15 can be established without proof that navigation has been actually obstructed by the voluntary sinking of a vessel. This does not, however, obviate the jurisdictional requirement that a private party seeking relief under § 15 allege some injury to fact to itself.

[26] Given our disposition of this claim, we need not decide whether a private cause of action for injunctive relief should be implied from § 15. Nonetheless, we think it appropriate to observe that our analysis of that issue with respect to § 13 is equally applicable to § 15.

fire in target practice or otherwise . . . ." 33 U.S.C. § 3. The sole express restraint imposed by the statute on the Secretary's power provides "that the authority conferred shall be so exercised as not unreasonably to interfere with or restrict the food fishing industry . . . ." *Id.* Pursuant to this authority, the Secretary has promulgated danger zone regulations individually tailored to the particular area of water in question. *See* 33 C.F.R. § 204.

In 1974 the Secretary of the Army promulgated the following regulation:

> Carribean Sea and Vieques Sound in vicinity of Eastern Vieques, bombing and gunnery target area.
>
> (a) *The Danger Zone.* From Punta Conejo on the south coast of Vieques at latitude 18°06′30″, longitude 65°22′33″; thence to latitude 18°03′00″, longitude 65°21′00″; thence to latitude 18°03′300″, longitude 65°15′30″; thence to latitude 18°11″30″, longitude 65°14′30″; thence to latitude 18°12′00″, longitude 65°20′00″; and thence to Cabellos Colorados on the north coast of Vieques at latitude 18°09′49″, longitude 65°23′27″.
>
> (b) *Regulations.* (1) It will be open to navigation at all times except when firing is being conducted. At such times no surface vessels, except those patrolling the area, shall enter or remain within the danger area. Prior to conducting each firing or dropping or ordnance the danger area will be patrolled to insure that no watercraft are within the danger area. Any watercraft in the vicinity will be warned that practice firing is about to take place and advised to vacate the area.
>
> (2) The regulations will be enforced by the Commander. Caribbean Sea Frontier, San Juan, P.R., and such agencies as he may designate.

33 C.F.R. § 204.234 (1979).

At trial, Puerto Rico contended that the Navy's use of this area for bombing and gunnery practice unreasonably interfered with the island's food fishing industry, in violation of 33 U.S.C. § 3. In rejecting this claim, the district court ruled that:

> The Plaintiffs herein have presented absolutely no evidence that Defendant Navy has impermissibly or unilaterally expanded the areas authorized as a danger zone (33 C.F.R. § 204.234) . . . The navigable waters contiguous to Defendant Navy's weapons training range at Vieques are navigable waters of the United States, and they have been restricted in exactly the manner intended by law and regulations.

478 F. Supp. at 701.

On appeal Puerto Rico argues that the district court failed to consider the needs of Vieques' fishing industry, in disregard of the statutory requirement that the danger zone regulation not unreasonably interfere with or restrict the food fishing industry. We conclude, however, that the only question properly before the court was whether the Navy had complied with the danger zone regulation.

As is apparent from the statutory language, the provision against unreasonable interference with the food fishing industry applies to the Secretary of the Army's exercise of his authority to prescribe and regulate. Assuming that the Navy has acted in accordance with 33 C.F.R. § 204.234, to decide whether the Navy has unreasonably interfered with fishing would necessarily draw into question the validity of the regulation under the enabling statute, 33 U.S.C. § 3. Yet Puerto Rico has not named the Secretary of the Army as a defendant in this case. Thus, if we, or the district court, were to define a standard of reasonableness for 33 U.S.C. § 3 and apply it to the facts of this case, we would do so in the absence of the agency responsible for the administrative determination that 33 C.F.R. § 204.234 comports with the statutory command. None of the record relevant to the formulation of this regulation is part of the record in this case.[27] Nor, of course, has the Secretary had the opportunity, at trial or on appeal, to defend the propriety of the regulation.

---

[27] The current regulation, 36 C.F.R. § 204.234, was promulgated only after the Corps of Engineers had provided public notice of the proposed regulation and an opportunity for comments. 39 Fed. Reg. 13889, 27133 (1974).

Had the district court ruled on whether 33 C.F.R. § 204.234 unreasonably interferes with the food fishing industry, we would vacate that ruling for the reasons stated above.[28] We conclude, however, that the court's decision is only a determination that the Navy has complied with 33 C.F.R. § 204.234. We need offer no opinion on this because Puerto Rico has not challenged it on appeal.

NOISE POLLUTION

In its complaint, Puerto Rico contended that the Navy's training activities generate "shock waves and excessive noise that unreasonably interfere with the health and welfare of residents of Vieques. . . ." It sought to enjoin these activities as a violation of the Commonwealth's criminal nuisance statute,[29] P.R. Laws Ann. tit. 33, § 1365,[30] alleged to be applicable to the Navy's operations through Section 4 of the Noise Control Act, 42 U.S.C. § 4903(b) (the Act).[31] The district court denied the request for an in-

---

[28] When necessary to protect the interests of an absent party, a court of appeals should consider *sua sponte* whether a claim should be dismissed for failure to join an indispensable party. *See Provident Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 111 (1968); *NLRB* v. *Doug Neal Management Co.*, 620 F.2d 1133, 1139 (6th Cir. 1980); *Kimball* v. *Florida*, 537 F.2d 1305, 1307 (5th Cir. 1976).

[29] Although Puerto Rico does not seek to impose criminal penalties on the Navy, it chose to base its case on its criminal nuisance law rather than its very similar civil nuisance statute, P.R. Laws Ann Tit. 32, § 2761, perhaps because the latter does not expressly refer to public nuisances. *See* note 40 *infra*. The choise of statute relied upon does not affect our analysis or conclusion.

[30] P.R. Laws Ann. tit. 33, § 1365 provides in pertinent part:

> Anything which is injurious to health, or is indecent or offensive to the senses, or is an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, river, bay, stream, canal or basin, or any public park, square, street or highway is a public nuisance[.]

[31] 42 U.S.C. § 4903(b) provides in pertinent part:

> (b) Each department, agency, or instrumentality of the execu-

junction, ruling that the Act does not apply because the nuisance statute does not establish noise control "requirements" as that term is used in Section 4. 478 F. Supp. at 675. Despite this ruling, the court proceeded to consider the evidence and determined that the noise attributable to the Navy's activities does not interfere with the quality of life on Vieques. *Id*: at 680. We conclude that the district court was without jurisdiction to entertain Puerto Rico's claim.

A careful reading of the Noise Control Act's citizen suit provision, section 12, 42 U.S.C. § 4911, discloses that Congress expressly created a private cause of action only with respect to the enforcement of federal noise control requirements. Subsection (a) permits "any person," including a state, to bring suit in federal district court against any federal agency that has violated a "noise control requirement." That term is defined in subsection (f) by reference to other sections of the Act, all of which concern the granting of regulatory powers to the Administrator of the EPA or the Secretary of the Treasury, and the enforcement of regulations promulgated thereunder. Section 12 has no provision for citizens' suits to enforce a federal agency's duty to comply with state and local requirements regarding the control and abatement of environmental noise. Thus, Puerto Rico's claim, premised on a violation of state law, cannot be maintained under § 12 of the Act, 42 U.S.C. § 4911.

In the absence of an alternative basis in federal law, the unavailability of § 12 warrants dismissal of this state law claim for lack of jurisdiction because it is otherwise barred by sovereign immunity. *See United States* v. *Testan*, 424

---

tive, legislative, and judicial branches of the Federal Government—

(1) having jurisdiction over any property or facility, or

(2) engaged in any activity resulting, or which may result, in the emission of noise,

shall comply with Federal, State, interstate and local requirements respecting control and abatement of environmental noise to the same extent that any person is subject to such requirements.

U.S. 392 (1976); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). We recognize, however, that § 4, to the extent it subjects every federal agency to state noise control requirements, arguably permits suit against an officer of a federal agency for a violation of those requirements.[32] If § 4 requires the Navy to comply with Puerto Rico's criminal nuisance statute, this responsibility may be enforceable by an implied cause of action under § 4.[33] We reach the latter question, however, only if we

---

[32] The doctrine of sovereign immunity bars suit against a federal agency *eo nomine* in the absence of an express congressional waiver. *See United States* v. *Testan*, 424 U.S. 392 (1976); *United States* v. *King*, 395 U.S. 1 (1969); *Commonwealth of Massachusetts* v. *United States Veterans Administration*, 541 F.2d 119 (1st Cir. 1976). In contrast, a federal officer is subject to suit despite the lack of express legislative waiver if that officer has acted outside the legal limitations on his authority. *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949). The federal mandate provided in 42 U.S.C. § 4903(b) constitutes such a limitation. *See Westinghouse Elec. Corp.* v. *Schlesinger*, 542 F.2d 1190, 1214 (4th Cir. 1976), *cert. denied*, *431 U.S. 924 (1977)*.

[33] A determination of whether Puerto Rico's nuisance statute constitutes a requirement under § 4 will also determine whether the district court had subject matter jurisdiction over this claim. This question of jurisdiction should be resolved prior to a decision of whether Puerto Rico has stated a claim upon which relief can be granted. With respect to the latter issue, we observe only that implication of a cause of action is plausible. Although no court has previously decided whether § 12 exclusively defines the available causes of action under the Act, several courts of appeals have considered, and disagreed, about the implication of a cause of action in an analogous statutory context. Both the Clean Air Act and the Federal Water Pollution Control Act (FWPCA) contain citizen suit provisions quite similar to § 12. *See* 42 U.S.C. § 7604; 33 U.S.C. § 1365. The Courts of Appeals for the Second, Third and District of Columbia Circuits have held that 33 U.S.C. § 1365 does not preclude, *inter alia*, implication of a cause of action under different substantive provisions of the FWPCA. *National Sea Clammers Ass'n* v. *City of New York*, 616 F.2d 1222, 1228–31 (3d Cir.), *cert. granted*, 49 U.S.L.W. 3281 (Oct. 14, 1980) (No. 79–1760); *Natural Resources Defense Council, Inc.* v. *Callaway*, 524 F.2d 79, 83–84 (2d Cir. 1975); *Natural Resources Defense Council, Inc.* v. *Train*, 510 F.2d 692, 698–703 (D.C. Cir. 1974). The Seventh Circuit has rejected this conclusion with respect to the Clean Air Act. *City of Highland Park* v. *Train*, 519 F.2d 681, 690–93 (7th Cir. 1975). *cert. denied*, 424 U.S. 927

first determine that Puerto Rico's nuisance statute establishes "requirements" that would trigger the application of § 4.

The key issue, therefore, is the definition of "requirements." As used in § 4 of the Noise Control Act, the term stands unexplicated by Congress or the courts. But the model from which § 4 was drawn,[34] section 118 of the Clean Air Act (currently codified at 42 U.S.C. § 7604), has received intense scrutiny. Judicial interpretation of the term "requirement" as used in § 118, and Congress' response to that interpretation, sheds considerable light on the definition of "requirements" as used in § 4.[35]

Section 118 of the Clean Air Act underwent its most important dissection at the hands of the Supreme Court in *Hancock* v. *Train*, 426 U.S. 163 (1976).[36] Two steps in the

---

(1976). In a case involving the FWPCA, this court expressly reserved decision of the question. *Commonwealth of Massachusetts* v. *United States Veterans Administration*. 541 F.2d 119, 122–23 & n.4 (1st Cir. 1976).

[34] Although the legislative history of § 4 does not identify § 118 as the prototype of § 4, there is a close similarity in the language of the two provisions. And the legislative history does establish expressly the overall importance of the Clean Air Act as a model for the drafters of the Noise Control Act. *See* S. Rep. No. 1160, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 4658, 4661, 4667.

[35] Section 313 of the Federal Water Pollution Control Act, 33 U.S.C. § 1323, also tracks the language of § 118 and has been similarly construed. *See Environmental Protection Agency* v. *California ex rel State Water Resources Board*, 426 U.S. 200 (1976).

[36] Congress legislatively reversed the actual holding of *Hancock* with the enactment of the Clean Air Act Amendments of 1977, Pub. L. No. 95–95, 91 Stat. 685. *See* H.R. 6161, 95th Cong., 1st Sess. 12, *reprinted in* [1977] U.S. Code Cong. & Ad. News 1089–90. Neither the amendments nor the committee reports undermine that part of the Court's reasoning upon which we rely. The companion case to *Hancock*, *Environmental Protection Agency* v. *California ex rel State Water Resources Board*. 426 U.S. 200 (1976), suffered like treatement with the enactment of the Clean Water Act of 1977, Pub. L. No. 95–217, § 60, 91 Stat. 1597, 1598. *See* S. Rep. No. 370, 95th Cong., 1st Sess. 67, *reprinted in* [1977] U.S. Code Cong. & Ad. News 4392. The apparent purpose of these amendments was to ensure the enforceabili-

Court's analysis are particularly apposite to the question before us. First, the Court's reading of § 118's legislative history disclosed that the various preliminary drafts and the committee reports used "requirements" interchangeably with "emission requirements" and "emission standards." *Id.* at 188–89 & n.2. Congress apparently understood "requirements" to refer to standards specifying the permissible emission levels for various point sources and pollutants.[37] Though hardly conclusive, the court's observation presents some evidence of the legislative use of the term in the pollution control context, and particularly in the drafting of the prototype for § 4.

The second step in *Hancock* pertinent to our inquiry rested on the Court's recognition of the close relationship between § 118 and § 304, the citizen suit provision of the Clean Air Act. 42 U.S.C. § 7604. "§ 118 establishes the duty of federal installations to comply with state 'requirements,' and § 304 provides the means of enforcing that duty in federal court." 426 at 196. Section 304 restricts the area subject to enforcement by suit to emission limitations or standards, standards of performance, and compliance schedules. The Court concluded that the scope of the § 304 enforcement power defined the scope of the § 118 duties because "it seems most unlikely that in providing that a State might bring suit in district court to enforce the duties of federal installations under § 118, the Congress would not make all those duties enforceable. . . ." *Id.* at 197.

We recognize a similar relationship between the "requirements" of § 4 and those of § 12 of the Noise Control

---

ty of the applicable substantive control requirements. We find no evidence that the amendments were intended to expand the category of applicable substantive requirements.

[37] The Senate Committee report that accompanied the final draft of the Noise Control Act offers some evidence of a similar understanding with respect to the control of noise. *See* S. Rep. No. 1160, 92nd cong., 2d Sess., *reprinted in* [1972] U.S. Cong. & Ad. News 4655. In particular, the Committee concluded that the federal noise control requirements that would be enforceable under § 12 should be "technologically-based standards" rather than the more open ended standard of the "public health and welfare," *Id.* at 4659.

Act. The primary objective in our attempt to clarify the term "requirements" is to ascertain Congress' intent and § 12 contains the sole legislative definition of that term in the Act. More importantly, that definition occurs in the provision for private enforcement of the Act. Section 12, unlike § 304 of the Clean Air Act, does not allow for suit by a state to enforce a state pollution control requirement. Thus, unlike the scheme of the Clean Air Act, § 12 does not define specifically which state requirements are incorporated in § 4 But it does permit a state to bring suit against a federal agency for violation of certain federal requirements. Considered together, the federal requirements enforceable under § 12 are the best evidence of the type of noise control requirement that Congress intended to be enforceable by suit against a federal agency.

Section 12 authorizes suit by a state to enforce "any noise control requirement," as defined in subsection (f). 42 U.S.C. § 4911(a). That definition in turn refers to several provisions of the Act which provide for (a) standards, rules or regulations controlling the noise emissions of motor carriers, railroads and aircraft, *id.* §§ 4916, 4917; 49 U.S.C. § 1431, (b) labelling regulations, 42 U.S.C. § 4907, and (c) noise emission standards applicable to specified domestic and imported products, *id.* §§ 4905, 4908. From these various provisions of the Act we can abstract the type of legal control contemplated by the statutory term "requirement." The appointed agency establishes a standard that sets forth, specifically, the allowable intensity, duration and character of sounds[38] from a certain type of source, and then measures the noise emissions of such sources against that standard. *See* 40 C.F.R. Parts 201–205. This type of control relies on relatively precise standards capable of uniform application to similar sources of sound. We conclude that when Congress used the term "requirements" in the Noise Control Act, it was in reference to regulations of this type.[39]

---

[38] *See* 42 U.S.C. § 4902(11) (definition of environmental noise).

[39] Puerto Rico relies on a statement in the Senate Committee's report that the Noise Control Act does not affect the authority of the

The final question is whether Puerto Rico's criminal nuisance statute embodies the kind of "requirements" with which the Navy must comply pursuant to § 4. The statute broadly proscribes as a public nuisance:

> Anything which is injurious to health, or is indecent or offensive to the senses, or is an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons[.]

P.R. Laws Ann. tit. 33, § 1365. Although the criminal nuisance statute has not yet been subjected to judicial scrutiny, the Supreme Court of Puerto Rico has interpreted the similarly worded civil nuisance statute.[40] It perceived as the essential purpose of that statute the maintenance of a balance between the defendant's right to the free use of his property and the rights of others to the comfortable enjoyment of life or property: To strike that balance requires a case by case determination of the reasonableness of a defendant's activity. *See Casiano Sales* v. *Lozada Torres*, 91 P.R.R. 473, 477–78, 482 (1964); *Arcelay* v. *Sanchez*, 77 P.R.R. 782, 790 (1955). This form of decisionmaking, peculiarly sensitive to the facts of a single case, permits no role for the type of specific, uniform standard characteristic of

---

states "to reach or maintain levels of environmental noise . . . through [*inter alia*] nuisance laws." S. Rep. 1160, 92d Cong., 2d Sess., *reprinted in* U.S. Code Cong. & Ad News 4660. But this statement is not part of the Committee's commentary on §§ 4 or 12. Rather, it addresses to what extent § 6 (42 U.S.C. § 4905), and regulations promulgated thereunder, would preempt state law as applied to products in the hands of the user. *Id.* Section 6 authorizes the adoption of noise emission standards to be applied to products at the manufacturing stage. Establishing that state law is not preempted in this particular context does not answer the distinct question of to what extent Congress intended to waive the federal government's sovereign immunity. Neither § 6 nor the Committee's commentary on § 6 addresses this question.

[40] P.R. Laws Ann. tit. 32, § 2761 states: "Anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance. . . ."

"requirements," as described above. Thus, we conclude that Puerto Rico's criminal nuisance statute falls outside § 4's incorporation of "State . . . requirements respecting control and abatement of environmental noise. . . ." 42 U.S.C. § 4903(b).

Our conclusion renders unnecessary a decision as to whether a private cause of action should be implied to enforce § 4's mandate. We see no other tenable ground upon which the district court has jurisdiction over the state nuisance claim. Therefore, we vacate the district court's decision and remand for dismissal for lack of jurisdiction.

ENDANGERED OR THREATENED SPECIES

Of the various animal species living in and around Vieques, four have been designated by the United States Fish and Wildlife Service as "endangered"[41] (of which three are in issue) and two others have been determined to be threatened,"[42] in accordance with the criteria of § 4 of the Endangered Species Act (the Act), as amended, 16 U.S.C. § 1533. *See* 50 C.F.R. § 17.11. The Commonwealth alleged that the Navy's training operations directly imperil these species and cause significant adverse changes in their habitats, contrary to the requirements of § 7 of the Act, *id.* § 1536, and the prohibition of § 9, *id.* § 1538. The district court found that the Navy's activities do not adversely affect the five species and in fact inadvertently create a refuge for these species, protecting them from local hunters. On appeal, the Commonwealth challenges the court's find-

---

[41] "The term 'endangered species' means any species which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). The endangered species on Vieques include the brown pelican, the manatee, the leatherback turtle and the hawksbill turtle. 50 C.F.R. § 17.11. The effects of the Navy's activities on the manatee are not at issue in this appeal.

[42] "The term 'threatened species' means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20). The threatened species on Vieques include the loggerhead turtle and the green turtle. 50 C.F.R. § 17.11.

ings and urges that the district court misconstrued the requirements of § 7(a). Because we conclude that the Navy has not fulfilled its obligations under § 7(a)(2), we vacate the district court's decision and remand for further consideration.

Section 4 of the Endangered Species Act directs the Secretary of the Interior and the Secretary of Commerce to determine which, if any, species are endangered or threatened, and to identify the critical habitat of the species so designated. 16 U.S.C. § 1533. As part of the Act's comprehensive design to protect such designated species, § 7(a)(2) provides:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [the critical] habitat of such species. . . .

Id. § 1536(a)(2).[43] Regulations promulgated jointly by the United States Fish and Wildlife Service and the National Marine Fisheries Service define the duty of a federal agency under § 7 to consult with those Services. 50 C.F.R. § 402.04. Every agency is required to review its programs and all other activities to determine whether any of its actions possibly affect endangered or threatened species or their habitats. *Id.* § 402.04(a)(1). Once an agency has discovered that some action for which it is responsible crosses the low threshold of possible effect, it must consult formally with the Fish and Wildlife Service or the Marine Fisheries Service. *Id.* § 402.04(a)(3). *See id.* § 402.01.

---

[43] "Secretary," as used in § 7 and the other provisions of the Act, refers to the Secretary of Interior or the Secretary of Commerce, depending on the particular species at issue. Although these two officials formally share the responsibilities created by the Act, their duties are actually performed by two departmental agencies—the United States Fish and Wildlife Service (Interior) and the National Marine Fisheries Service (Commerce). For the remainder of this opinion, we refer to the Service rather than the Secretary.

Formal consultation requires that the agency request a "biological opinion" from the appropriate Service, and supplement the request with the available pertinent information. *Id.* In response, the Service issues a written statement that sets forth (1) its opinion on whether the agency is in violation of § 7(a)(2), (2) the information upon which it based its opinion, and (3) "recommendations for modifications in the identified activity program which would enhance the conservation and protection of a listed species or its critical habitat." *Id.* § 402.04(e)(4). *See* 16 U.S.C. § 1536(b).[44]

As of the date that the district court entered judgment, the Navy had failed to obtain a biological opinion with respect to the impact of its Vieques operations on the five listed species. By ignoring the statutory mandate, the Navy has sidestepped the administrative process that Congress expected would resolve many of the conflicts between agency action and the requirements of § 7.[45] If the Navy had sought consultation within a reasonable period following the adoption of the Act, the burden of litigating Puerto Rico's claim might have been avoided. The Navy's nonfeasance also has denied the district court potentially valuable evidence. In considering the 1979 amendments to the Act, Congress found, with approval, that courts have accorded substantial weight to a sound biological opinion in determining an agency's compliance with 7(a)(2).[46] Finally,

---

[44] Although the regulations, promulgated on January 4, 1978, made optional the offering of recommendations. Congress has since mandated inclusion of such recommendations in a biological opinion. Pub. L. No. 95-632, 92 Stat. 3751 (1978). *See* H. Conf. Rep. 1804, 95th Cong., 2d Sess. 18, *reprinted in* [1978] U.S. Code Cong. & Ad. News 9486; H.R. Rep. No. 1625, 95th Cong., 2d Sess. 11/12, *reprinted in* [1978] U.S. Code Cong. & Ad. News 9461-2.

[45] *See* H.R. Rep. No. 167, 96th Cong., 1st Sess. 5, *reprinted in* [1979] U.S. Code Cong. & Ad. News 4765; H. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 18, *reprinted in* [1978] U.S. Code Cong. & Ad. News 9486; H.R. Rep. No. 1625, 95th Cong., 2d Sess. 11, *reprinted in* [1978] U.S. Code Cong. & Ad. News 9461.

[46] H. Conf. Rep. No. 697, 96th Cong., 1st Sess 12, *reprinted in* [1979] U.S. Code Cong. & Ad. News 4780. *Compare National Wildlife Federation* v. *Coleman*. 529 F.2d 359, 372/75 (5th Cir. *cert. denied sub*

biological opinions not only address possible violations of 7(a)(2), but more generally recommend conservation measures designed to mitigate or remove all adverse effects on an endangered or threatened species. These recommendations pertain to the statutory responsibility of agencies to carry out "programs for the conservation of endangered species or threatened species . . . ." 16 U.S.C. § 1536(a)(1).[47] Although the district court apparently found that the refugee effect created by the Navy's activities satisfied this obligation, *see* 478 F. Supp. at 689–90, a biological opinion could alter this conclusion.

Since entry of judgment, the Navy has received a biological opinion from the United States Fish and Wildlife Service. But that opinion is not part of the record and we therefore disregard it in our decision of this case. *See Construction Agregates Corp. v. Rivera de Vicenty, (1st Cir. 1978); Rosen v. Lawson-Hemphill, Inc.*, 549 F.2d 205, 206 (1st Cir. 1976). To do otherwise would be contrary to Federal Rule of Appellate Procedure 10(a) and would preclude the district court from considering evidence that both this court, and Congress, deem essential to a complete decision of the issue. Moreover, the Commonwealth should have the opportunity to challenge the adequacy of the biological opinion, both in terms of its factual basis and its recommendations.

The Commonwealth also challenges the Navy's training activities under § 9 of the Endangered Species Act, 16 U.S.C. § 1538. Section 9 prohibits any person, including an

---

nom. Boteler v. *National Wildlife Federation*, 429 U.S. 979 (1976) *with Sierra Club* v. *Froehlke*, 534 F.2d 1289, 1301–05 (8th Cir. 1976). *Cf. North Slope Borough* v. *Andrus*, 486 F. Supp. 332, 351–54 (D.D.C.), *vacated on other grounds sub nom. National Wildlife Federation* v. *Andrus*, No. 80–1148, et al. (D.C. Cir. Sept., 1980) (evaluation of a biological opinion in light of the statutory purposes).

[47] The statute defines "conservation" to mean "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. § 1532(3).

officer or department of the federal government, from taking an endangered species. *Id.* § 1538(a)(1)(B).[48] Taking is defined by the statute as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* 1532(19). As interpreted by the Fish and Wildlife Service, harassment includes a significant disruption of normal behavioral patterns likely to cause injury, and harm includes significant disruption of essential behavioral patterns or environmental degradation, 50 C.F.R. § 17.3. So far as can be discovered from the briefs and the record, we understand Puerto Rico's claim under § 9 to rest on the proscription of harassment and harm as those terms are defined by the Fish and Wildlife Service. Because of the close similarity between this particular prohibition and the requirements of § 7(a), we conclude that the § 9 claim should be remanded along with the § 7 claim. The district court should have the benefit of the biological opinion in determining whether the Navy's operations respect the proscription of § 9.

We vacate the district court's decision with respect to the Endangered Species Act and remand for further consideration in light of this opinion.

Preservation of Historic and Prehistoric Sites

Puerto Rico alleged in its complaint that the Navy's complete failure to identify and protect all the sites on Navy property that are of historical or archeological significance violated § 106 of the National Historic Preservation Act (16 U.S.C. § 470f), Executive Order 11593 and regulations

---

[48] Section 9 provides in pertinent part:

> (a)(1) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to—
>
> (B) take any such species within the United States or the territorial sea of the United States[.]

16 U.S.C. § 1538(a)(1)(B).

issued by the Advisory Council on Historic Preservation.[49] After Puerto Rico had filed its complaint, the Navy undertook a combined sampling and predictive survey of the island which disclosed the existence of a number of sites on Navy property at least some of which may be eligible for inclusion in the National Register of Historic Places. The district court concluded that this survey satisfied the Navy's obligation to locate sites, 478 F. Supp. at 693. The court also ruled, however, that the Navy had violated the Executive Order by failing either to nominate to the Secretary of the Interior those newly discovered sites that may be eligible for listing in the Register or to seek the Secretary's opinion on their eligibility, *Id.* at 694. The court ordered the Navy to correct this omission and to safeguard the potentially eligible sites. *Id.* at 708.

On appeal, neither party challenges the district court's ruling with respect to determining the eligibility of known sites. But the Commonwealth does question the court's decision on the adequacy of the Navy's survey. According to the Commonwealth, testimony by the Navy's own experts establishes that the survey did not locate all the sites on the island, as is required by the Act, the Executive Order, and the Advisory Council's regulations. We agree.

Section 106 of the National Historic Preservation Act, as amended, imposes a basic responsibility on "the head of any federal agency" to "take into account the effect" of a proposed federal undertaking "on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register." 16 U.S.C. § 470f. With the promulgation of Executive Order 11593, the President substantially expanded the mandate of § 106. The order requires that every federal agency.

> (a) no later than July 1, 1973, with the advice of the Secretary of the Interior, and in cooperation with the

---

[49] The Advisory Council on Historic Preservation is an independent agency, 16 U.S.C. § 470i, authorized to "promulgate such rules and regulations as it deems necessary to govern the implementation of section 470f . . ." *Id.* § 470s.

liaison officer for historic preservation for the State or territory involved, locate, inventory and nominate to the Secretary of the Interior all sites, buildings, districts and objects under their jurisdiction or control that appear to qualify for listing on the National Register of Historic Places.

(b) exercise caution during the interim period until inventories and evaluations required by subsection (a) are completed to assure that any federally owned property that might qualify for nomination is not inadvertently transferred, sold, demolished or substantially altered.

36 Fed. Reg. 8921 (May 13, 1971), *reprinted in* 16 U.S.C. § 470 at 28. The express obligation imposed by the Executive Order to locate "all" possibly eligible sites has been further defined within the past two years by the Advisory Council on Historic Preservation. *See* 36 C.F.R. § 800.4. The Council's regulations reaffirm "the responsibility of each Federal agency to identify or cause to be identified any National Register or eligible property . . . that may be affected by the undertaking." *Id.* § 800.4(a). Moreover, the regulations contemplate an active consultive role for the "State Historic Preservation Officer" from the inception of a federal agency's efforts to fulfill its historic preservation responsibilities. *See id.* § 800.4. Thus, the first step in satisfying an agency's obligations under the Executive Order and the regulations is to locate, in consultation with the state's officer for historic preservation, "all" and "any" sites that may be eligible for inclusion in the National Register.[50] The sole question is whether the Navy has satisfactorily completed that first step.

---

[50] Although by its terms § 106 applies only to proposed undertakings, the Navy does not challenge the validity of Executive Order 11593 or the Council's regulations as applied to current undertakings. There is good reason for their acquiescence. Executive Order 11593 expressly derives its statutory authority not only from the National Historic Preservation Act but also, *inter alia*, the National Environmental Policy Act, 42 U.S.C. §§ 4331 et. seq. Although NEPA refers only to proposed major federal actions, it has been construed to apply to ongoing federal activities. *Jones* v. *Lynn*, 477 F.2d 885, 889 (1st Cir. 1973);

The Navy' survey of Vieques, which in design encompassed the entire island, relied on a combination of three methods. The island was divided into 665 squares, each of which measured 500 by 500 meters. Ten percent of the squares were selected randomly as samples. Another group of samples, approximately ten percent of the squares, were selected by randomly choosing one square and then selecting every tenth square after the first one choosen. The third method began with a search by the Navy's archeologist of the available literature and interviews with local residents having special knowledge of the island's history. On the basis of this inquiry, and his prior experience, he directed the survey team to the squares that he predicted were most likely to contain archeological remains. The squares that were selected by these three methods were then walked by members of the survey team at intervals of 100 meters. Each square was traversed in a criss-cross fashion, the surveyor walking several times along the line of each 100 meter point from east to west and then from north to south.

The Navy defends its survey as a responsible and reasonable good faith effort to locate the archaeological sites that still exist on Vieques. According to the Navy, when it had completed the survey it had satisfied the duty imposed by the Executive order and the regulations to locate all sites that may be eligible for inclusion in the National Register. But the testimony of the archeologist responsible for the design of the Navy's survey belies this contention. He testified that there remain to be located a substantial number of sites of possible archeological value. Thus, he characterized the survey as preliminary and acknowledged the need for additional work. Given the likelihood of further discoveries, the Navy's position flies in the face of the re-

---

Evironmental Defense Fund v. *TVA*, 468 F.2d 1164, 1176–81 (6th Cir. 1972); *see TVA* v. *Hill*, 437 U.S. 153, 188 n.34 (1978). More generally, the reasoning underlying this construction of NEPA supports a similar conclusion with respect to the scope of § 106 of the National Historic Preservation Act. *See Jones* v. *Lynn*, 477 F.2d at 889; *Environmental Defense Fund* v. *TVA*, 468 F.2d at 1176–81.

quirement that it locate "*all* sites that appear to qualify for listing on the National Register of Historic Places." Executive Order No. 11593, 36 F.R. 8921, *reprinted in* 16 U.S.C. § 470 at 28, (emphasis added). We assume without deciding that the survey methods adequately identified the likely locations of eligible sites. We cannot condone, however, the Navy's failure to gather in all the fruits of its survey.

Far from suggesting that the Navy must perform the impossible, we conclude only that it must follow up on the leads produced by the survey it commissioned.[51] Our conclusion does not require the Navy to undertake a 100% survey of Vieques. The current survey not only disclosed the probable existence of other sites but also established the archeological sterility of certain areas of the island: further efforts in those areas would be fruitless. It is not possible to ascertain from the present record which areas do require more investigation. Once the survey results are clarified, the district court, with the aid of the parties, should be able to define with fair precision what additional action is required of the Navy. We assume that any proposal made by the Navy to complete its obligation to locate all sites will be formulated in consultation with the Commonwealth officer responsible for historic preservation, as mandated by Executive Order 11593 and 36 C.F.C. § 800.4. Finally, although our decision pertains solely to the Navy's survey efforts, the district court is not foreclosed from considering on remand whether the Navy has taken sufficient measures to

---

[51] We agree with the Commonwealth that the Navy would be well advised to emulate the cooperation shown by the Pacific Fleet in the survey of the Hawaiian island of Kahoolawe. *See Aluli* v. *Brown*, 437 F. Supp. 602 (D. Hawaii 1977), *rev'd in part on other grounds*, 602 F.2d 876 (9th Cir. 1979). This does not mean, however, that an exact replication of the Kahoolawe survey, which will ultimately cover 100% of the surface area of the island, is required of the Navy with respect to Vieques. Unlike Kahoolawe, it appears very unlikely that the entire island of Vieques would be eligible as a single district for inclusion in the National Register. *See Aluli* v. *Brown*, 437 F. Supp. at 610. What impresses us about the Kahoolawe survey is the extensive cooperation between the Navy and state officials and the good faith effort to locate all potentially eligible sites.

safeguard any sites which have been or are likely to be located and may be eligible for inclusion in the National Register.[52]

We vacate the district court's decision on the adequacy of the Navy's efforts to locate all sites of historical or archeological value, and remand for further consideration in light of this opinion.

The Remedy

We turn finally to a review of the district court's remedial order with respect to three rulings. The court held as follows:

> (1) That Defendant Navy is in violation of the Federal Water Pollution Control Act, *supra*, by reason of its lack of a NPDES permit to cover the occasional release of firing of ordnance into the waters of Vieques.
>
> (2) The Defendant Navy is in violation of Executive Order 11593, *supra*, by reason of its failure to nominate to the Secretary of the Interior various sites in Vieques that may be eligible for listing in the National Register of Historic Places, and/or by its failure to seek the opinion of the Secretary respecting said eligibility, and
>
> (3) That Defendant Navy is in violation of the National Environmental Policy Act, *supra*. by its failure to file an environmental impact statement in connection with its activities in and around Vieques.

---

[52] The Navy urges that the pending Memorandum of Agreement between it and the Advisory Council obviates any further judicial scrutiny of its efforts to comply with the Executive Order and the regulations. But such agreements relate to the mitigation of adverse effects on sites that already have been located. *See* 36 C.F.R. § 800.6(b), (c). The pending agreement would be complete only after the Navy has fulfilled its obligation to locate all eligible sites. If an agreement has been executed, we expect that the district court would consider it in evaluating the adequacy of the Navy's efforts to protect the eligible sites.

478 F. Supp at 705. The court ordered the Navy to take the necessary steps to achieve compliance, but refused to enjoin the Navy from continuing its training operations. *Id.* at 708. The Commonwealth challenges the court's denial of its request for a prohibitory injunction as mistakenly based on a balancing of equities. According to the Commonwealth, having found the Navy in violation of the NEPA, the FWPCA, and the Executive Order, the court had no choice but to halt the Navy's operations until the violations were cured. We consider this challenge as directed to each of the three rulings.

1. The NPDES Permit Requirement

With respect to the violation of the Federal Water Pollution Control Act, we conclude that the district court erred in undertaking a traditional balancing of the parties' competing interests. In *TVA* v. *Hill*, the Supreme Court refused "to strike a balance of equities" where "Congress, exercising its delegated powers, had decided the order of priorities in a certain area . . ." 437 U.S. 153, 194 (1978); *see also United States* v. *City and County of San Francisco*, 310 U.S. 16, 30–31 (1940). Like the statutory mandate at issue in *Hill*, the NPDES permit requirement of the Federal Water Pollution Control Act embodies a congressional ordering of priorities. Congress has prohibited "the discharge of any pollutant," 33 U.S.C. §1311(a), which includes the Navy's dropping of ordnance into the coastal waters, unless a NPDES permit has been secured pursuant to 33 U.S.C. § 1342. Whether or not the Navy's activities in fact harm the coastal waters, it has an absolute statutory obligation to stop any discharges of pollutants until the permit procedure has been followed and the Administrator of the Environmental Protection Agency, upon review of the evidence, has granted a permit. Thus, regardless of the district court's finding that the Navy's dropping of ordnance caused no significant harm to the environment, it erred in failing to consider the judiciary's "responsibility to protect the integrity of the . . . process mandated by Congress . . . " *Jones* v. *Lynn*, 477 F.2d 885, 892 (1st Cir. 1973); *see Realty Income Trust* v. *Eckerd*, 564 F.2d 447, 456–57 (D.C.

Cir. 1977).[53] Although on this record the district court did not clearly err in its finding, the permit process "might reveal substantial environmental consequences," *City of New York* v. *United States*, 337 F. Supp. 150, 160 (E.D.N.Y. 1972), *quoted in Realty Income Trust* v. *Eckerd*, 564 F.2d at 456, that would lead the Administrator to deny the application or grant only a limited permit. Unlike the situation presented in *Essex County Preservation Ass'n* v. *Campbell*, 536 F.2d 956, 960–61 (1st Cir. 1976), where the statutory violation was deemed "technical," here the Navy has utterly disregarded the statutory mandate.[54] Thus, we vacate the district court's order on this question and remand with instructions to order the Navy to take all steps necessary to insure that no ordnance is discharged into the coastal waters of Vieques until such time as it obtains a NPDES permit.[55] If this order significantly interferes with the Navy's preparedness, it is free to request the President to exempt it from the NPDES requirements in the interest of national security. *See* 33 U.S.C. § 1323(a).

2. Executive Order 11593

The Commonwealth offers no reason for us to alter the district court's order insofar as it requires the Navy to protect all sites that may be eligible for inclusion in the National Register of Historic Places. Given the district court's finding that the Navy's operations do not presently threaten the known sites, which is not clearly in error, it was not

---

[53] Although *Jones* and *Eckerd* involved the procedural requirements of the National Environmental Policy Act, we think this responsibility holds as true with respect to the NPDES permit process. *See Save Our Sound Fisheries Ass'n* v. *Callaway*, 387 F. Supp. 292, 299–300 (D.R.I. 1974).

[54] Unlike the environmental impact statement requirement of the NEPA, 33 U.S.C. § 1311(a) is not satisfied by the filing of any application; only the granting of a NPDES permit releases a party from that provision's prohibition. Thus, our conclusion is not altered by the fact that the Navy has now applied for a permit.

[55] Insofar as most, if not all, of the Navy's targets are land based, we doubt that this order will significantly impair the Navy's military preparedness.

an abuse of the court's discretion to impose a limited order rather than a wholesale proscription of the Navy's operations. Although, as already discussed, we have decided that the Navy has yet to satisfy its duty under Executive Order 11593, nothing in the present record suggests that the training activities as a whole endanger the additional sites likely to be located. It is open to the district court on remand to modify its order in light of further discoveries or evidence that the Navy has failed to safeguard the potentially eligible sites.

3. The Environmental Impact Statement

Since entry of the district court's judgment, the Navy has prepared a final environmental impact statement (EIS), as required by the court's order and 42 U.S.C. § 4332(2)(C). As a result, we conclude that the issue of whether the training operations should be halted for failure to prepare and file and EIS is moot. Although neither party raised this question, this court has a responsibility to consider *sua sponte* whether an issue on appeal has been rendered moot by subsequent events. *See North Carolina* v. *Rice*, 404 U.S. 244, 245 (1971). At oral argument, counsel for the Navy informed us that a final EIS had been prepared and we assume that it has been filed in accordance with 42 U.S.C. § 4332(2)(C). *See DeFunis* v. *Odegaard*, 416 U.S. 312, 317 (1974). Nothing would be gained by enjoining the Navy's operations for failure to do that which it has done. *See id.* at 316. Nor is there a " 'reasonable expectation that the wrong will be repeated.' " *United States* v. *W.T. Grant Co.* 345 U.S. 629, 632 (1953), *quoted in County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979). Because our conclusion pertains only to the preparation and filing of an EIS, it does not foreclose the Commonwealth from challenging the adequacy of the EIS or the Navy's response to the EIS findings. *See Crowell* v. *Mader*, 444 U.S. 505, 506 (1979). We therefore vacate the order of the district court requiring the Navy to prepare and file an environmental impact statement with instructions to dismiss the claim as moot.

SUMMARY

We affirm the district court's findings and rulings, as modified by our opinion, except as follows:

(a) the decision with respect to § 15 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 409, is vacated and remanded for dismissal of the claim for lack of jurisdiction;

(b) the decision with respect to § 4 of the Noise Control Act, 42 U.S.C. § 4903(a), and Puerto Rico's criminal nuisance statute, P.R. Laws Ann. tit. 33, § 1365, is vacated and remanded for dismissal of the claim for lack of jurisdiction;

(c) the findings and ruling with respect to § 7(a) and § 9 of the Endangered Species Act, 16 U.S.C. §§ 1536(a), 1538, are vacated and remanded for further consideration;

(d) the ruling with respect to Executive Order 11593 and 36 C.F.R. § 800.4 is vacated and remanded for further consideration;

(e) the order with respect to the NPDES permit requirement is vacated and remanded with instructions for further proceedings in accordance with this opinion is filed this day.

(f) the order with respect the preparation and filing of an environmental impact statement pursuant to 42 U.S.C. § 4332(2)(C) is vacated and remanded with directions to dismiss.

Affirmed in part, vacated in part and remanded in part.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 79–1626.

CARLOS ROMERO-BARCELO, ETC., ET AL.,
PLAINTIFFS, APPELLANTS,

CARLOS ZENON, ET AL.,
PLAINTIFFS-INTERVENORS, APPELLEES,

v.

HAROLD BROWN, ET AL.,
DEFENDANTS, APPELLEES.

Before COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

ORDER OF COURT

Entered February 27, 1981

The petition for rehearing filed by Carlos Romero-Barcelo, et al and the petition for rehearing filed by the Secretary of Defense are hereby denied.

By the Court:

/s/ DANA H. GALLUP
Clerk.

Appendix C

U.S. DISTRICT COURT
DISTRICT OF PUERTO RICO

CARLOS ROMERO-BARCELO, Governor of Puerto Rico, *et al.*, *CARLOS ZENON, et al.*, Plaintiffs-Intervenors, v. HAROLD BROWN, *et al.*, LUIS MEDINA, *et al.*, Plaintiffs, FUNDACION ARQUEOLOGICA, ANTROPOLOGICA E HISTORICA DE PUERTO RICO, Plaintiff-Intervenor, v. HAROLD BROWN, *et al.*, Defendants, Nos. 78–323 and 78–377, September 17, 1979

Full Text of Opinion

DECISION AND ORDER

TORRUELLA, J.

In substance, these suits concern the military use by the United States Navy of land which it owns in the Island of Vieques, a civilian municipality of the Commonwealth of Puerto Rico. They bring into focus the delicate and complex constitutional interplay that exists between our three branches of Government, as well as between the Federal and local establishments and its citizens.

I. *Procedural Preface*

The parties to these actions are as varied and as multifarious as the issues which they raise.

In Civil Number 78–323 the Plaintiffs[1] are Carlos Romero Barceló, who is the Governor of the Commonwealth of Puerto Rico, Radamés Tirado Guevara, the Mayor of Vieques, and the Environmental Quality Board, an administrative agency of the Commonwealth charged by law with protection of the environment in Puerrto Rico.[2] The Defendants in that suit are Harold Brown, Secretary of De-

[1] These Plaintiffs will hereinafter be collectively referred to as "Plaintiffs Romero-Barceló et al."

[2] See 12 L.P.R.A. 1131; *Connomwealth of Puerto Rico v. S.S. Zoe Colocotroni*, 456 F. Supp. 1327, 1337 [11 ERC 2107] (D.P.R., 1978).

fense of the United States, W. Graham Claytor, Jr., the Secretary of the Navy, James L. Holloway, Chief of Naval Operations I.C. Kidd, Jr., Commander in Chief of the Atlantic Fleet, and Louis H. Wilson, Commandant of the Marine Corps.[3] After the commencement of this suit on March 1, 1978, additional Plaintiffs sought and received permission to intervene. They were Carlos A. Zenón, Mario Félix, Mariano Rivera Guishard, Alicio Ayala Soto, Francisco Medina Meléndez, Esmeraldo Meléndez and Santos Ríos, fishermen who are resident of Vieques, and the "Asociación de Pescadores de Vieques, Inc.", a cooperative of Vieques fishermen.[4]

The Plaintiffs in Civil Number 78–377, which was filed on March 8, 1978, are Luis Medina, Jesús Medina, Mario Antolino Félix, Cristóbal Medina, Severino Ventura Cintrón, Héctor Medina, Cristóbal Medina, Jr., Enrique García, Antonio Ayala González, Angel Ventura, and Daniel Medina, all fishermen and/or residents of Vieques, and Misión Industrial de Puerto Rico, Inc., an entity which is allegedly interested in advocating environmental causes.[5] Intervention was also sought and allowed in this case on behalf of "Fundación Arqeuológica, Antropológica e Histórica de Puerto Rico", a non-profit corporation involved in research and preservation of historical and prehistorical cultural resources.[6] The Defendants in this suit are the same as those in Civil Number 78–323, except for the addition of William R. Flannagan, Caribbean Commander of the Atlantic Fleet, Swain Wilson, Commandant of the United States Coast Guard, and unnamed John Doe Defendants.

---

[3] These Defendants, together with other Defendants mentioned in Civil Number 78–377, will hereinafter be collectively referred to as "Defendant Navy."

[4] These Plaintiffs-Intervenors will hereinafter be collectively referred to as "Plaintiffs Zenón, et al."

[5] These Plaintiffs will hereinafter be collectively referred to as "Plaintiffs Medina, et al."

[6] This Plaintiff-Intervenor will hereinafter be referred to as "Plaintiff Fundación."

After various preliminary procedural interchanges, including a hearing in which a request for a temporary restraining order was denied in Civil Number 78–377, Civil Numbers 78–323 and 78–377 were consolidated. It is appropriate to briefly set forth the allegations in the various complaints.

Plaintiffs seek to enjoin Defendant Navy from using any portion of its lands in Vieques, or in the waters which surround this Island, for the purpose of carrying out naval training operations. Broadly speaking, the complaints allege harm to all residents of Vieques, to its fishing and agricultural industries, to certain endangered species of plant and wildlife, to officially designated and unidentified historical sites and to private property, all as a consequence of Defendant Navy's activities.

The main thrust of Plaintiffs Romero-Barceló's allegations in Civil Number 78–323 is related to claims of violation by Defendant Navy of various environmental laws. These claims include the alleged failure of Defendant Navy to prepare and file an environmental impact statement pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. §§ 4321 *et seq.)*, as well as other substantive offenses thereunder, and alleged violation of the Federal Water Pollution Control Act of 1972 (33 U.S.C. § 1311), the Water Pollution Control Act of Puerto Rico (24 L.P.R.A. §§ 591, *et seq.*), Public Policy Environmental Act (12 L.P.R.A. §§ 1121 *et seq.*), and Executive Order No. 11752 (38 F.R. 34793); the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. §§ 1401, 1411 and 1412); the Clean Air Act (42 U.S.C. §§7401 *et seq.);* the Noise Control Act of 1972 (42 U.S.C. §§ 4901 *et seq.*) and the general Nuisance Law of Puerto Rico (33 L.P.R.A. § 1365); the Resource Conservation and Recovery Act (42 U.S.C. §§ 6901 *et seq.);* the Endangered Species Act of 1973 (16 U.S.C. §§ 1531 *et seq.*); the National Historic Preservation Act (16 U.S.C. §§ 470 *et seq.)*, and Executive Order 11593 (36 F.R. 8921); the Coastal Zone Management Act (16 U.S.C. §§ 1451 *et seq.*); the Marine Mammal Protection Act of 1972 (16 U.S.C. §§ 1361, *et seq.*); the Rivers

and Harbors Act of 1899 (33 U.S.C. § 407); the First and Fifth Amendments to the Constitution, and Presidential Orders and Congressional restrictions relating to the transfer of military activities from the Island of Culebra, another off-shore municipality of the Commonwealth.[7] The allegations of Plaintiffs Zenón et al are substantially a copy of the complaint of Plaintiffs Romero Barceló et al, with the exception that additional contentions are made with regards to violations of the Federal Relations Act of 1950 (48 U.S.C. 749) and the Water Law of Puerto Rico (12 L.P.R.A. §§ 1501–1523).

In Civil Number 78–377 Plaintiffs Medina et al, in addition to also relying on the previously enumerated claims, allege various other basis for relief, including a challenge to the taking and acquisition by Defendant Navy of the land on which the activities subject of these suits are carried out, allegations of violation of the Organic Act of 1900 ("Foraker Act") (31 Stat. 77), the Organic Act of 1917 ("Jones Act") (39 Stat. 951), the Federal Relations Act (64 Stat. 319, 48 U.S.C. 731 *et seq.*), and of certain treaties (15 U.S.T. 1636), by virtue of Defendant Navy's use of the navigable waters surrounding Vieques, and claims for damages arising by reason of Defendant Navy's allegedly intentional and/or negligent actions, which claims are ostensibly grounded on the Federal Tort Claims Act (28 U.S.C. 2671 *et seq.*). The contentions of Plaintiff Fundación are similar to parallel ones by Plaintiff Romero Barceló et al, based on the National Historic Preservation Act of 1966, supra, and Executive Order 11593, supra.

For the present moment, suffice it to say that Defendant Navy's answers put at issue Plaintiffs' allegations and resulted in a trial lasting three months in duration. Sixty three witnesses, many of them leading authorities in various fields of expertise, as well as hundreds of exhibits were presented during the course of this legal marathon. Additionally, at the request of the parties, the Court con-

---

[7] See *Feliciano* v. *United States*, 297 F.Supp. 1356 (D.P.R. 1969), *aff'd.* 422 F.2d 943 (C.A. 1, 1979), cert. den. 400 U.S. 823 (1970).

ducted two field trips to various sites in and around Vieques. The Court consolidated the preliminary and permanent injunction hearings.

Because these cases present such an all-inclusive challenge to Defendant Navy's presence and activities in Vieques, we must commence our homeric voyage through this evidence with some relevant background discussion about the Island in question.

II. *Background*

A. *Physical Biography*

Vieques is a long narrow island located approximately 6 miles off the Southeastern coast of the main Island of Puerto Rico and about 9 miles due South of its sister municipality of Culebra. It is nearly 20 miles long and 4.5 miles wide at its widest point, and is oriented on an East-West axis. The Island has an area of about 33,000 acres or 51 square miles of land.

The topography of Vieques is dominated by a backbone of rolling hills several hundered feet in height leading up to Monte Pirata in its western extremity, which at nine hundred and eighty one feet is the highest point on the Island. The shores are principally composed of calcareous sandy beaches, interrupted by several rocky promontories, particularly in the eastern extremities, and in the points of the various half-moon bays located throughout the southern coast. There are fringe and off-shore coral reefs mostly in the northern, eastern and southern sectors.

The mean average temperature is 80° and the average annual rainfall is 46.23 inches, mostly concentrated in the central and western areas. There are no permanently flowing fresh water streams or rivers. Generally speaking the prevailing winds are from the East; however, they tend to bend towards the Northeast along the north coast and the South East along the southern shores.

The ocean and wave action follow a pattern similar to that of the wind. The ocean currents are also generally wind-oriented from East to West, but tidal flow can affect

this pattern substantially, particularly in the eastern and western extremities of the Island where the tide moves north when ebbing and south when flooding.

The biota of Vieques is typical of a Caribbean Island with low population density but contains some unique features as well.

The flora is in large part determined by the various humidity zones as well as the present land use, a matter we shall presently deal with in greater detail. Suffice it to say for the moment that it generally tends to run from thorny brush in the East to lusher vegetation in the West, the central strip being subjected to some cultivation of minor crops. Scrub grass covers much of the bare ground throughout Vieques. There are several large stands of mangrove along the coast, the most important of which are the vicinity of Punta Arenas in the West, and surrounding Puerto Mosquito, Puerto Ferro and Ensenada Honda on the South. Inland from these are generally found dryland forests of ucar *Bucida buceras*). Many areas of the ocean floor in the immediate vicinity of the coast are covered with stands of sea grasses, mostly of the *thalassia* variety, the largest of these concentrations starting West from Punta Caballo on the North coast and fanning around Punta Arenas to the South West. There are also large seagrass areas in the South in Ensenada Honda and in Bahía Salinas del Sur.

Vieques' animal life includes several species of particular interest to the present action. In addition to the usual complement of fish and bird population[8] there are present in Vieques six species which are designated as either "endangered" or "threatened" pursuant to statute or regulations.[9]

---

[8] There are no wild land mammals in Vieques other than rodents, mongooses, and bats. They, as well as the various resident species of land reptiles and crustacians, play no significant role in this controversy.

[9] 16 U.S.C. §§ 1361 *et seq.*; 16 U.S.C. §§ 1531 *et seq.*

These are the brown pelican *(Pelecanus occidentalis)*,[10] the manatee *(Trichechus manatus)*,[11] the leatherback turtle *(Dermochelys cariocea)*,[12] the hawksbill turtle *(Eretmochelys imbricata)*,[13] the loggerhead turtle (*Caretta caretta*),[14] and the green turtle (*Chelonia mydas*).[15]

Three coves in the Southern coast of Vieques (Puerto Mosquito, Puerto Ferro and Bahía Topón) contain an unusual phenomena found occasionally[16] in protected shorelines of tropical waters, within very particular physical and biological parameters. This phenomena is known as bioluminescense, a process which has not been fully explored scientifically but which is believed to be related to the presence of microscopic dinoflagellate[17] activated by specific physical circumstances.

B. *Pre-History and History*

A brief look at Vieques' pre-history and history will give us some insight into the problems we are faced with in the present case.

The first semi-permanent inhabitants of Vieques were Carib Indians. They arrived in the period immediately preceding the discovery of Vieques by Christopher Columbus (1493), and for various decades thereafter.[18] These seagoing tribes came up from the northern coast of South

---

[10] 35 Fed.Reg. 16047 and 18319, 50 C.F.R. § 17.11 p. 12. Puerto Rican residents of this species are a subspecies denominated *pelecanus occidentalis occidentalis*.

[11] 16 U.S.C. § 1362(5); 50 C.F.R. 17.11 p.59.

[12] 50 C.F.R. 17.11 p. 80.

[13] Id.

[14] Id.

[15] Id.

[16] Only four other similar bays are known to exist in the World.

[17] *Pyrodinioura bahamense* (Pyrcophyta-Dinoflagellata).

[18] Some sources date the Carib's arrival to Vieques at about 1480. See Irving Rouse, "Scientific Survey of Porto Rico and the Virgin Islands", Volume XVIII, Part 4, page 565, New York Academy of Sciences, New York, 1952.

America via the Lesser Antilles and used Vieques as a base from which to carry out their fierce raids into Puerto Rico. Prior thereto, commencing as far back as perhaps 850 A.D., various migratory waves of Arawak Indians[19] which originated in the Orinoco Basin, passed through the Island on their way to more permanent abode in Puerto Rico and Hispanola. In historic times, Indians from Puerto Rico and St. Croix, Virgin Islands moved to Vieques to escape the Spanish conquest.[20] The Spanish forces sent to conquer Vieques had little influence on the native population living there and no attempt was made by Spain to colonize the Island at this point.

During the 17th and 18th Centuries the French, English, Dutch and Danes all attempted to establish footholds on Vieques. In 1673 the Spanish attacked and destroyed the colonial population and thereafter continued to send military expeditions from time to time. In 1816, colonists from Saint Thomas and St. Croix asked and received permission to establish a livestock industry in Vieques, and thus began what is today the Island's dominant agricultural activity. One year later the Governor of Puerto Rico delegated authority to one of these colonists and thereafter a fort was built at Isabel Segunda, the capital of Vieques. By 1828 the population of Vieques was 122 engaged mostly in timber harvesting for export to the Virgin Islands, in the growing of crops and livestock, and in fishing. After 1869, economic activity increased and sugar cane became the leading crop.

In 1898, and as a result of the Spanish-American War Vieques together with the rest of the present-day Commonwealth of Puerto Rico became a territory of the United

---

[19] Id. Both *the Igueri* (Saladoid) and Taino cultures of the Arawaks were ceremic and agricultural, which are normally indicative of higher social organization. It is probable that preceramic (Coroso) Indians preceded the Arawaks to Vieques, and perhaps also Ciboney Indians from Hispanola. Id. pp. 570.

[20] Ironically, in recent times many present day inhabitants of Vieques have migrated to St. Croix.

States.[21] Through the early 1940's, the principal activities in Vieques were the growing of sugar cane and livestock, and fishing. The total population throughout this period fluctuated between 6,000 and 12,000. The population of Vieques according to the 1970 census was 7,767 persons of which 2,378 lived in Isabel Segunda and 620 in Esperanza, the Island's two towns, and 4,769 were classified as rural inhabitants. Sugar is no longer of any relevance, and the principal agricultural endeavours are related to the planting of some minors crops, and to livestock. Fishing is still of importance to the local inhabitants.

As previously stated, Vieques is a civilian municipality of the Commonwealth of Puerto Rico. It is divided into seven wards ("barrios"): Puerto Diablo, Puerto Ferro, Puerto Real, Florida, Mosquito, Llave and Punta Arenas. During the period from 1939 to 1944, Defendant Navy acquired title by purchase to 26,000 of the 33,000 total acres of Vieques. This property is physically divided into two sections and is bisected by the civilian area of Vieques. (See Appendix A).

The eastern part of the naval reservation includes Barrio Puerto Diablo and most of Barrio Puerto Ferro. The western part begins at a north-south line which commences west of Punta Caballo and continues south to the eastern end of Laguna Playa Grande. It includes the barrios of Punta Arenas, part of Mosquito, Llave and Florida. There is also an additional area in the middle of civilian sector known as Barriada Monte Santo, to which Defendant Navy holds title but in which there has been considerable civilian squatting with Defendant Navy's knowledge and acquiescence.[22]

---

[21] See Treaty of Paris of 1898, Art. II, 1 L.P.R.A. Historical Documents, p. 17; see also, *Balzac* v. *Porto Rico*, 258 U.S. 298, 305 (1922).

[22] This parcel, together with various other parcels in the other two sectors of Defendant Navy's Vieques properties, have been declared surplus property and turned over to the General Services Administration, who has for some time been conducting interminable negotiations with the Commonwealth Government for their transfer.

III. *Defendant Navy's Activities in and around Vieques.*

Generally speaking, in the eastern sector are located a Marine Corps facility known as Camp García, a 5000 foot airstrip not presently in active use, a heliport, a field ammunition depot, the bulk of the beaches used for amphibious landings, an observation post complex on top of Cerro Matias, and the various ordnance impact zones, with related targets. The western sector is mainly used for the storage of ammunition in the bunkers spread throughout this area, as well as for quarrying, some amphibious operations, and some of the non-firing small unit training. Also in this sector is located a break-water-pier at Desembarcadero Mosquito, an administrative center, and an electronic warfare facility on the summit of Monte Pirata.

Defendant Navy's properties in Vieques are part of a much larger and inclusive military complex known as the Atlantic Fleet Weapons Training Range, which consists of four ranges: the inner range in the east end of Vieques, previously alluded to; the outer range, which is an ocean range extending both north and south of Puerto Rico and to the east; the underwater tracking range at St. Croix, Virgin Islands; and an electronic warfare range. All of the operations of these various ranges are directed from a center located at the Roosevelt Roads Naval Station in Ceiba, Puerto Rico, approximately 7 miles northeast of Vieques across Vieques Sound.

The outer range is at least 35 miles north of Vieques and 20 miles to the south. On this range are conducted various surface and anti-aircraft gunnery exercises as well as missile exercises, including surface-to-air, surface-to-surface, air-to-surface and air-to-air training.

The underwater tracking range is located in waters varying in depth from 200 fathoms to 500 fathoms off the western shore of St. Croix (and south east of Vieques), and encompasses 21 square nautical miles. This range is used for training for accurate three-dimensional tracking of surface and underwater objects.

The electronic warfare range is a complex of so-called threat platform simulators located at various sites in

Puerto Rico and adjacent islands, including Monte Pirata as previously stated, as well from one sea-going location. These facilities provide a realistic electronic environment for the training of shipboard electronic order-of-battle, in support of exercises and operations conducted on the various other ranges.

A. *The inner range*

The inner range (see Appendix B), which consists of air-to-ground, ship-to-shore, and artillery targets, is locally controlled from the observation post previously mentioned atop Cerro Matías. The post is surrounded by a 1200 yard safety zone into which no ordnance may be discharged.

The public is notified that the range will be used through notices to airmen, notices to mariners and fishermen's notices. Fishermen's notices indicate the schedule of activities for the following week and include a map of the island of Vieques for aid to the reader in determining the activated areas. These notices are widely distributed and posted, including at the fishermen's cooperative. In the event of a change in activities, written schedule is printed and distributed at least 24 hours in advance to fishermen. Defendant Navy does not restrict access to the waters in the danger zone at[23] Vieques except shortly prior to, during, and immediately after training operations utilizing these waters.

---

[23] As a further warning device regarding the danger zone, Defendant Navy has placed a buoy at the western edge of the danger zone in the southern coast, established under 33 C.F.R. 204.234. The buoy consists of 3 yellow balls, each about 4 feet in diameter, welded together, on which there is a triangular warning sign.

There are two restricted areas (see 33 C.F.R. 207.815(2),(3)), in the coastal waters off Vieques, activated at all times: one on the south coast around the Camp García area, extending 1,500 yards offshore; and a second one around the Naval Ammunition Facility at the west end of the Island, including Mosquito Pier, extending 1,500 yards offshore.

Defendant Navy has both CB radios and a VHF unit for communication with the fisherman. In fact, Defendant Navy installed a VHF unit in the fishermen's cooperative for their use in contacting the observa-

This range normally opens at 7:30 A.M., with firing commencing at 8:00 A.M., and usually closes at 10:00 P.M.[24] When the range is active, a red eight-foot square flag is flown from a 15 foot pole above the observation post during the daylight hours, and a red rotating beacon is operated at all times. Prior to commencing range use, a patrol aircraft covers the water areas around the Island to assure that the area is clear. When required, a patrol boat is also used for this purpose. The range control officer on location can visually observe the entire land mass area and the surrounding sea and air space for considerable distances.[25] Additionally, there are two radars observing the surface water area and to maintain the position of ships while firing on the range.[26]

In the event of unauthorized entry on the range while the same is in use, the range officer immediately halts the firing and personnel is dispatched to clear the range fouler. The United States Coast Guard provides assistance for such contingencies in the danger areas of the surrounding waters.

---

tion post atop Cerro Matías. This has proven to be a useless gesture as the fishermen either refuse or neglect to make use of this facility.

On shore, there are warning signs in Spanish and English posted at intervals along the entire length of the entire length of the cattle fence which acts as the western boundary of the inner range. Signs are also posted along the beaches.

There is a guard at the main gate of Camp García to prevent the entry of unauthorized personnel into the eastern end of the Vieques Naval properties. The cattle fence is patrolled.

[24] Operations are authorized until 11:00 P.M. as a safety cushion. Exceptions have been made for naval gunfire exercises, and for air-to-ground operations with inert ordnance. In rare instances, the range has opened at 6:00 A.M.

[25] For visual observation the range officer is usually assisted by binoculars. The range of unaided, accurate, line of sight observation from the observation post is approximately 5 miles on a clear day.

[26] Aircraft are tracked by radar located at the Roosevelt Road center.

There have been occasions when ships or aircraft have disregarded safety precautions incorporated in the range user's manual or the range officer's instructions. The range officer has authority, which has in fact been exercised at times, to order an offender off the range.

In addition to fire control and related safety measures, one of the principal functions of the observation post is the scoring of the firing. This is accomplished visually, in the case of ship-to-shore firing, and by television in the case of air-to-ground bombing.

The eastern boundary of the inner range is a north-south fire break, approximately 20 meters in width, running from a point just west of Bahía Playa Blanca and continuing directly south to the shore west of Cerro Indio. This boundary is referred to by Defendant Navy as the "Eastern Friendly Front Line." No ordnance is used east of this demarcation. Immediately to the west of this line commences the Air Impact Area and Close Air Support Zone (AIA/CAS) which extends west to another north-south fire break known as the "Western Friendly Front Line." This line commences on the shore of Bania Icacos and runs directly south past the eastern edge of an unnamed lagoon, to the beach at Bahía Salinas del Sur. The area between the two "Friendly Lines" is also known as the Naval Gunfire Support Range (NGFS). West of the Western Friendly Front Line is the Surface Impact Area (SIA) which runs to another north-south boundary commencing from a point west of Bahía Fanduca in the south, to the north shore three fourths a mile east of Puerto Diablo. A cattle fence, which is approximately 1,000 yards west and parallel to this SIA boundary, marks the western most extension of the inner range.

Since most of the controversies in this case arise out of Defendant Navy's activities within inner range, we shall describe these and the facilities therein located with greater detail.

(1) *The targets*

The inner range contains two bullseye targets, referred to as Targets 1 and 2. These are used for inert ordnance

practice with Mark 76 practice bombs[27] and 2.75 mm, inert rockets. Live ordnance is never used on these targets. Target I is located approximately half way up on the Western Friendly Front Line. It is 400 feet in diameter and consists of 4 concentric rings of tires, 50 feet apart. Target 2, which is made up of three similar rings 300 feet in diameter, is located approximately two statute miles west of Target 1.

At the southern extremity of the Western Friendly Front Line is located a strafing target. Again, only inert ordnance is used against this target.

The AIA/CAS zones are the air-to-ground live ordnance target areas.[28] The targets consist of realistic mockups of an airstrip, a fuel farm, a motor pool, an ammunition dump, SAM rocket sites, and numerous targets of opportunity such as tanks, a convoy and airplanes. (See Appendix B).

There is also one stationary water target currently active[29] located about a mile off the eastern tip of Punta Este and consisting of a floating buoy. It was installed for inert, air-to-ground activity and has been used very infrequently.

A Mark 33 SEPTAR, which is an 18 foot drone target boat operated remotely from Cerro Matías, is sometimes operated in Bahía Salinas del Sur for air-to-ground exercises using inert ordnance.

In August of 1977 a target barge was anchored off the southeastern tip of Vieques for about a month. A guided 500 pound inert glide bomb called SMART ROC was fired at it.

---

[27] 250 pound bombs.

[28] They also contain some targets against which only inert ordnance is allowed.

[29] Sometime around 1976 a landing craft, the USS Killen, was anchored just north of Roca Alcatraz, in Bahía Salinas del Sur, and used as a floating target using live Mark 82 Series 500-pound bombs. The ship was eventually leveled to the waterline and it broke-up and sunk sometime in the Spring of 1977. The wreck is presently sitting in two sections on the bottom of Bahía Salinas del Sur.

All of the targets described above in the inner range, with the exception of the water targets, were installed and operational by the end of 1971. Some of the targets in the SIA and AIA were in use for some years prior to that.

(2) *Air-to-ground activities*

The type of aircraft usually involved in ordnance delivery on the AIA/FAS targets and on the two bullseye targets are A–4, A–6 and A–7 fixed wing jet aircraft flying either from carriers lying offshore or from the Roosevelt Roads Station.

It is standard procedure to conduct safety and range use briefings for all range users, including air crews. These procedures are outlined in the range user's manual and will be discussed hereinafter.

Coming out of Roosevelt Roads aircraft take off on a heading of either 060° M and turn on a radial of 100° M headed out to an area 3 miles off the central Vieques coast. In a warning area north of Vieques known as Whiskey 428, the radial 100° M intersects Defendant Navy's operational area. Aircraft in this area must file a flight plan and are controlled by the Federal Aviation Administration (F.A.A.). At this point aircraft will be at about 6–7000 feet in altitude, climbing and proceeding easterly until they reach an area directly off Punta Este where they will begin a turn to the south. The aircraft must maintain altitude until they are inside a restricted area south of Vieques known as Romeo 7104, and then must descend immediately to an altitude of about 8000 [sic] feet and proceed over the target low enough to identify the same.

If the point of origin of aircraft coming into the inner range is an aircraft carrier operating in the north, they are required to pass through a designated area known as Point November, about 4 miles north of Vieques. The aircraft come in on a southerly heading through Point November at an altitude of between 12–15,000 feet. This altitude reservation is pre-established by agreement with the F.A.A.

If the aircraft carrier is operating to the south of Vieques, aircraft come in through Romeo 7104 as it lines up

with Whiskey 428, in a two mile wide corridor on a northerly heading.

Normally aircraft come over the range area in group of 3 or 4, 5 aircraft being the maximum that Targets 1 and 2 can handle in a pattern.

Aircraft loaded with either inert or live ordnance are not permitted by range regulations to overfly any civilian area, and no credible proof was presented during the trial of any practice to the contrary.

After the target identifying run, the aircraft must assume a course pointed at the designated target and with wings level, whereupon he is declared "cleared hot" after visual observation of the range control officer stationed at the observation post atop Cerro Matías.[30] Thereafter the pilot is permitted to arm the aircraft's master switch and to fire when he gets within the correct range. As the aircraft pulls off the target, it is required to advise the range officer that the master switch is on a "safe" position so that no ordnance may leave the plane. The minimum separation interval between different aircraft firing is 30 seconds. The second aircraft is not permitted to fire until the first aircraft over the target calls in that its master switch is "safe."

For bombing runs aircraft typically pass over target at about 1500 feet. In strafing, aircraft turn at about 3000 feet, fire at about 500 feet and pull out over the target at about 200 feet.

The course headings for the various targets are predetermined. The approach for Targets 1 and 2 and for the strafing target is from the south, on 010°M headings. Over Target 1 the pilot must make a right-hand turn off the target, except in instances where Target 2 is not activated when he may request a left-hand turn. The normal pattern

---

[30] In the case of operations conducted during the night time hours, the target identifying run is preceded by the dropping of parachute illumination flares. An exception to this made for night radar bombing with light inert ordnance, which is conducted only by special permission and after the pilot has made daylight runs on the same target.

for Target 2 is counterclockwise. In a left-hand turn off Target 2, the closest distance to the civilian sector is about 5.8 miles (to Barrio Santa María).[31] The approach to the AIA/CAS targets is also from the south on courses of between 330°M and 030°M. Over the AIA/CAS targets the normal pattern is a right hand turn, although a left-hand turn can also be requested.

(3) Ship-to-shore activities

As previously intimated ship-to-shore firing is also conducted in the inner range. This takes place into the same AIA/CAS zone, on six point targets located around the shore-line of Bahía Salina del Sur and on two area targets. As in the case of air-to-ground range users, ships crews must receive a briefing prior to arrival on the range.

Ships fire only from the waters to the south of Vieques. Upon arrival at the range, each ship must work its way through the range, visually identifying each one of the point targets and plotting them on a chart. The naval gunfire range can accommodate two ships maneuvering on the range at one time, but only one ship can fire at a time. During gunfire, except on rare occasions, the ships are between three to eleven miles from the shoreline. As previously stated, while firing the ship's position is monitored by the observation post's radar. Only live ordnance is used by ships as it has been found that inert naval ordnance creates a safety and scoring problem by its propensity to ricochet and its difficulty of observation.

When ship-to-shore firing is scheduled, air-to-ground activity is restricted to Target 2.

(4) *Field artillery*

To the west of Cerro Matías is located the SIA, previous-

---

[31] The width of a turn off Target 1 or 2 is about 1500–2000 yards offset from the Target rhumb line, except that sometimes in a right turn off Target 1 the pilot extends the turn and comes out to the end of the Island.

ly described, which is the Marine Corps artillery range.[32] This is the live ordnance target area which is closest to the civilian populated areas. It is approximately 6.2 miles from Barrio Santa María. This type of practice involves the firing of howitzers, singly or in batteries, from positions along the vicinity of the SIA's western boundary toward targets near the Western Friendly Front Line, that is, from west to the east. Howitzer activity normally occurs only twice a year during the Marine amphibious exercises which will be subsequently discussed.

B. *The Ground Maneuvering Area (GMA)*

The GMA is the principal Marine Corps training area in Vieques. This area is located within the zone comprised from the cattle fence previously described, which is the eastern boundary, all the way to the western property line contiguous to the civilian sector. The property line is marked by a chain link fence, topped by barbed wire.

(1) *Camp García*

On the south western extremity of the GMA is the Marine camp previously referred to, Camp García. This camp has sufficient facilities to accommodate several thousand troops, although its present complement is about 150 men. Camp García has been operational since the early 1940's although improvements and additions have been carried out until recent times. The intensity of its use has fluctuated with the variated state of world affairs.

The airstrip which is adjunct to the base is operational but has only been used once in recent years and this was to allow an emergency landing by a civilian aircraft. Air transport to the base is conducted through a heliport located on a grassy field. The frequency of use of the heliport depends in large part on the training pressures of the GMA. Normal helicopter traffic in and out of Camp García, or the pads

---

[32] This area has occasionally also been used for air-to-ground machine gun fire by Marine helicopter gun ships firing from west to east on targets on the side of a hill.

atop Monte Pirata and Cerro Matías, does not overfly the civilian sector of Vieques.

(2) *Amphibious landings*

The GMA contains the beaches wherein the Marines conduct the bulk of their amphibious landings in Vieques.[33]

The principal landing beaches are called Red Beach and Blue Beach and are located on the south coast in an area designated as "Amphibious OP Area South", which runs from Punta Conejo on the east to Punta Negra on the west. Both beaches are immediately to the north of two cays approximately 2½ miles apart but which are confusingly enough both called "Cayo Chiva." Yellow Beach, which is south of Cerro Matías in the immediate vicinity of Punta Matías, is rarely used because of the other activities that are conducted in the SIA zone. On the north coast, in the "Amphibious OP Area North", is located Purple Beach between Punta Goleta and Punta Campanilla. Purple Beach is also used infrequently.

A typical landing exercise on OP Area South involves various support ships in the vicinity of the south coast off the restricted area south of Red and Blue Beaches. Those are large amphibious attack transports from which are launched the landing craft and amphibious tracked vehicles. These vessels proceed to the beaches where they land the troops as well as supporting tank, field artillery and vehicle units.

In recent years these exercises have included vertical envelopment landings by helicopter-borne troops. These are sometimes conducted independently of conventional amphibious operations. Those maneuvers include helicopter carriers within the supporting fleet. The troop landings take place inland of the conventional landing beaches.

---

[33] Green Beach (Punta Arenas) on the north western extremity of Vieques is also a designated landing beach but has only rarely been used as such. It is in practice a recreational beach used in large part by both civilians from Vieques and weekend-visiting yachts from Puerto Rico notwithstanding its lying within the restricted area previously described in Note 23.

Landings are usually accompanied by realistic low-level support flights by Marine air units of fixed wing, jet aircraft or helicopter gunships. If ordnance is used, this is expended within AIA/CAS zone. Naval units may be involved in activities related to the NGFS area.

Upon landing the troops engage in various tactical maneuvers throughout the GMA related with the securing of predetermined objectives in the area. At times, the landings are opposed by "enemy" troops, which have periodically included units of the Puerto Rico National Guard. As part of these acitivites the howitzer exercises previously described are carried out.

After the exercises are completed, the troops and their equipment are normally embarked in the same manner as landed.

The amphibious exercises previously described usually take place throughout the year and in various degrees of complexity, involving from a score of men to various thousands of troops, and from one vessel to large supporting fleets. They can also be independent of other Naval activities or be part of "sequential" operations in which the different segments of a naval force (aircraft, ships and landings) are coordinated in a hopefully well-timed sequence.

C. *The Naval Ammunition Facility (NAF)*

As previously indicated, the NAF covers the entire portion of Vieques to the west of the civilian sector.

Before we discuss the principal activity in this area we should state that it contains a designated landing zone in the south western coast. This landing area is sometimes used for infiltration type exercises by small units.

The NAF is not properly a part of the Inner Range, although it may indirectly support its activities. It is a division of the weapons department of Roosevelt Roads and its main function is as a magazine for the storage of ammunition for both ship-to-shore and air-to-ground firing.[34] The

---

[34] This storage is referred to as "deep storage" because the ordnance is placed there not for trans-shipment, but to remain on location until

principal "client" of the NAF is of course Defendant Navy, but it also stores ammunition for the Puerto Rico Air and Army National Guard.

A link wire fence, again topped by barbed wire, separates the NAF from the civilian sector. It has two guarded gates and its perimeter is secured by roving patrols.

Ordnance is stored in 102 bunkers spread throughout the NAF, of which only 76 are presently in use. They are an average of 450 feet away from each other and are designed and built in such a manner that if one were to explode, no damage would occur to another magazine or any off-station location (from which the nearest is 2000 feet away.)[35]

The bunkers are periodically inspected by several levels of supervision, as often as on a monthly basis. The last major inspection of the magazines was conducted by the Naval Sea Systems Command on May 15, 1978. No deficiencies were found.

The ammunition is landed in Vieques from civilian cargo ships docking at Mosquito Pier in the north coast. There is also an ammunition anchorage area off this sector for ships that may have to await approaching the dock.

Ammunition may be moved from the NAF to the GMA through the civilian sector. This consists of anything from 5.56 caliber small arms rounds up to 175 millimeter howitzer ammunition.[36] Eighty-one millimeter white phosphorous smoke rounds are also occasionally moved to Cerro Matías.

---

withdrawn for use. This ammunition is for contingency use only. A small percentage is actually used on Vieques itself.

Only conventional ordnance is stored in Vieques, although some dynamite is also kept there for blasting in quarries. No poisonous gas or nuclear weapons are stored in Vieques.

[35] If a magazine with 30,000 pounds of explosives (a representative figure) were to explode, only minimal damage would be done to a building 1,250 feet away.

[36] In the last twelve months, there have been eight issues of ammunition to the Marines at Camp García and six issues to Cerro Matías. The last movement of 155 or 175 millimeter ammunition to Camp García was on March 12, 1976.

The ordnance is transported by pick-up trucks when it is small amounts, or in a larger truck when large amounts are involved, with an escort in front and in back. The ammunition-carrying vehicle is identified with a placard and red flags in accordance with Department of Transportation regulations. 49 C.F.R. 177.823. The boxes of ordnance are also marked with signs clearly signifying that they are mass detonating high explosives.[37] 49 C.F.R. 172.1 *et seq.* Prior to hauling ammunitions in a truck, the truck is inspected for 23 items by the driver. The drivers who haul ammunition are specially trained and tested. Only naval personnel who have been specially trained handle ordnance on Vieques.

Two overland routes are used to transport ammunitions from the NAF to the GMA. One is through the front gate on the north side of the Island and through Isabel Segunda. The second is through the back gate on the south side of Vieques, which route is used most frequently because it passes through areas with fewer people and less traffic.

There has not been any known accident from handling ammunition on Vieques.

We thus arrive to the legal issues raised by Plaintiffs' complaints.

IV. THE LEGAL ISSUES

A. *Preliminary Questions Raised by Defendant Navy's Motion to Dismiss*

Shortly before the commencement of trial Defendant Navy filed a Motion to Dismiss. Because of the tardiness of this filing the Court decided to take it under advisement

---

[37] Mass detonating high explosives are those which detonate instantaneously if ignited. They are known as Class A expolsives and carried in accordance with Department of Transportation regulations. 49 C.F.R. 173.1 *et seq.* We note that transportation of hazardous material apply only to carriers in commerce, see: 49 U.S.C. §§ 1801 *et seq.*; 49 C.F.R. 171.1.

and allow opposing counsel to file opposition thereto. No opposition was in fact filed, although some of the issues were covered by Plaintiffs Romero-Barceló *et al.* in their brief.[38]

(1) *The Party Defendants*

All complaints except that of Plaintiff Fundación, attempt to state claims against Defendants in their individual as well as official capacities. These complaints however, are silent as to the personal involvement of any of these Defendants, nor do they specify what claims are stated against which Defendant in their individual capacities. The rule that constitutional and other claims against government officials in their individual capacities must be pleaded with specificity has thus been violated. *Rotolo* v. *Borough of Charleroi*, 532 F.2d 920,922 (C.A. 3, 1976).

Furthermore, it is well established that Federal officials are not vicariously liable for the acts of their subordinates, *Black* v. *United States*, 534 F.2d 524, 528 (C.A.2, 1976), and Plaintiffs must show a direct involvement or responsibility on the part of each of the named Defendants in the action of which they complain. *Rizzo* v. *Goode*, 423 U.S. 362, 371, 375–376 (1976).

On all these counts Plaintiffs have failed and thus the actions against Defendants as individuals must be dismissed.

The allegations in Plaintiffs Medina et al's complaint against "John Doe" and "Unknown Federal Agents" must also be dismissed as there is no provision in the Federal Rules of Civil Procedure for suit against persons under fictitious names. See: Rules 4(d)(1); 10(a), 17(a) Red.R.Civ.P.; *McDonald* v. *General Mills, Inc.*, 387 F.Supp. 24,33 (E.D.Cal., 1974).

---

[38] Plaintiffs Medina et al and Zenón et al have in fact refused to file any post trial brief or proposed findings, all inviolation of specific orders of this Court. These Plaintiffs, who were allowed to litigate *in forma pauperis* and supplied with daily copy of the trial record at considerable public expense, sought voluntary dismissal without prejudice after the trial had ended. This action which we consider to have been taken in bad faith by said Plaintiffs, was denied by the Court.

(2) *The actions that seek damages for allegedly tortious conduct*

Although the United States is not named as a party Defendant, the various nuisance and tort claims are in reality claims against the sovereign. In determining this, we are not bound by the naming of individual Defendants nor by Plaintiffs' characterization of the suit. *Sportique Fashions Inc.* v. *Sullivan.* 421 F.Supp. 302, 305 (N.D.Cal. *Pursuant to Dugan* v. *Rank*, 372 U.S. 609, 620 (1963), a suit is deemed to be against the sovereign if the judgment would expend itself on the public treasury or interfere with public administration. See also *Smith* v. *Grimes*, 534 F.2d 1346,1351 (C.A. 9,1976), cert. den. 429 U.S. 980(1976). These claims have precisely that effect, particularly where there is no allegation or proof that any of Defendants took any action beyond the scope of their authority. They thus qualify for absolute immunity as to common law torts and statutory claims under *Barr* v. *Mateo*, 360 U.S. 564 (1959); *Howard* v. *Lyons*, 360 U.S. 593 (1959); *Sportique Fashions*, supra. at 305–306; as the import of these claims would only fall upon the United States. *Larson* v. *Domestic & Foreign Corp.* 337 U.S. 682 (1949) *Minnesota* v. *United States*, 305 U.S. 382 (1939); *Commonwealth of Mass.* v. *U.S. Veteran's Administration*, 541 F.2d 119 (C.A. 1, 1976).

It is elementary that the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, constitutes an express, but limited waiver of sovereign immunity. Although negligent actions of government agents constituting a common law tort may be sued upon, intentional torts are specifically excluded from this waiver. 28 U.S.C. 2680(a)(h). See *Dalehite* v. *United States*, 346 U.S. 15(1953). Claims against the Government based upon the concept of nuisance however, are included. *In Re: Silver Bridge Disaster Litigation*, 381 F.Supp. 931, 967 (S.D.W. Va., 1974). But the statute specifically requires an initial presentation of the claim to the appropriate federal agency and a final denial by that agency as a prerequisite to suit. 28 U.S.C. 2675. This requirement is jurisdictional and cannot be waived. *Bialowas* v. *United States*, 443 F.2d 1047, 1049 (C.A. 3, 1971); *Collazo* v.

United States, 372 F.Supp. 61 (D.P.R. 1973). Plaintiffs have made no allegation nor presented any evidence to show compliance with this prerequisite.

The consequence of this situation is that the nuisance claims of Plaintiffs Romero Barceló, et al, Zenón et al and Medina et al, to the extent they may be interpreted as seeking damages, and the intentional and/or negligent conduct counts of Plaintiffs Medina et al's complaint, must be dismissed for lack of jurisdiction.

(3) *Plaintiffs Medina et al "taking" claims*

Plaintiffs Medina et al claim that they have been deprived of their property without just compensation when agents of the United States purchased a large number of private tracts in Vieques in "about 1941" which tracts are now part of the lands used by Defendant Navy. Here again we see that the real party is the United States and not the named individual Defendants.

With the exception of one Plaintiff, Angel Ventura, none of the other Plaintiffs have any standing to sue as they do not even allege to have been "deprived" property owners.[39] In any event, these claims are subject to the provisions of the Tucker Act, 28 U.S.C. §§ 1346(a)(2), 149, under which the Plaintiffs would have to sue. *Dow* v. *United States*, 357 U.S. 17, 21 (1958).

The statute of limitations under this legislation is six years measured from the time when the cause of action first accrues against the Government. 28 U.S.C. § 2501. *Camacho* v. *United States*, 494 F.2d 1363 (Ct. Cl., 1974); *Castro* v. *United States*, 500 F.2d 436 (Ct. Cl. 1974). The time of taking is the date when the United States first enters into possession or files a declaration of taking, whichever is earlier. *Dow* v. *United States*, supra. Thus the

---

[39] Class certification "of all those persons who, at the time of the Navy occupation of the Island of Vieques, in or around 1941, and thereafter, onwed (sic) property, and were deprived of that property due to illegal actions of the United States Navy", was never granted. See *Romero Barceló* v. *Brown*, 78F.R.D.531, 535(D.P.R., 1978).

time for filing a suit against United States would have expired in "about 1947", and a suit filed in 1978, as in the present case, is absolutely time barred. See *Camacho* v. *United States*, supra.

B. *The Federal Water Pollution Control Act*

Plaintiffs' claims under the Federal Water Pollution Control Act (33 U.S.C. 1251–1376, as amended), referred to in this Section as the "Act", fall into two categories: (1) that Defendant Navy is required to obtain a National Pollution Discharge Elimination System (NPDES) permit for its discharge of sewage at Camp García and for the alleged discharge of ordnance from ships and planes which fall into the sea surrounding Vieques; (2) that the Defendant Navy is violating various Puerto Rican laws incorporated by reference into this Act (see 33 U.S. 1323).

The uncontroverted evidence presented, including the testimony of the President of Plaintiff Environmental Quality Board, clearly establishes that Defendant Navy no longer discharges treated sewage effluent from its plant at Camp García into the waters surrounding Vieques.[40] This operation has been converted to a land discharge, for which no permit is required under the Act.

As to the discharge of sewage by Defendant Navy's vessels into the surrounding sea, although there is no direct evidence presented of this taking place, the nature of Defendant Navy's operations make this a distinct possibility. The evidence is however, that with the exception of landing barges, these vessels operate beyond the three-mile limit, which is the maximum geographical coverage of the Act. 33 U.S.C. 1362(7), (8) and (12). Furthermore, the Secretary of Defense has exempted these vessels from marine sanitation

---

[40] In contrast we should note that the Municipality of Vieques is one of 25 coastal municipalities in Puerto Rico that still discharge municipal wastes directly into the coastal zone, and is considered by Plaintiff Environmental Quality Board to "be a major source of pollution." (See *Exhibit CRB 400A*, page 95). These wastes reach coastal waters "relatively undiluted and without having been completely broken down biologically."

requirements pursuant to authority conferred by the Act. 33 U.S.C. 1322(d).[41]

It is our opinion that the majority of the ordnance that falls into the waters surrounding Vieques does so by chance, although it appears that this may happen with some frequency in the waters in the immediate vicinity of Bahía Icacos and Bahía Salinas del Sur in the AIA/CAS/NGFS zones. Furthermore, as previously stated, a water target exists east of Punta Este which lies within the "territorial seas." 33 U.S.C. § 1362(8).

We must decide whether these accidental bombings of the navigable waters, and the occasional intentional bombing of the water target, require that Defendant Navy obtain a NPDES permit.

The conduct that requires an NPDES permit is "the *discharge* [or runoffs] of any pollutants" (emphasis added), 33 U.S.C. 1311(a), § 1323(a). The term "discharge of any pollutant" means:

> ". . . (A) any addition of any *pollutant* to navigable waters from any *point source*.
>
> (B) any addition of any *pollutant* to the waters of the contiguous zone or the ocean from any *point source* other than a vessel or other floating craft." (Emphasis added). 33 U.S.C. 1362(12).

"Pollutant" is defined as:

> ". . .dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage *sludge*, *munitions*, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cel-

---

[41] The Secretary has promulgated regulations which exempt these vessels from the provisions for marine sanitation until April, 1981 (Department of Defense Directive Number 6050.4, April 28, 1976; see also: 40 C.F.R. 140.3(b). The regulations also exempt vessels totally, '. . . while conducting or participating in military operations and exercises [including training and readiness exercises and operations], within the navigable waters of the United States . . ." Department of Defense Directive Number 6050.4, April 28, 1976, part VIII(B)(2).

lar dirt and industrial, municipal and agricultural waste discharged into water . . ."

"Point source" in turn is defined as:

> "*any* discernible, confined and discrete *conveyance*, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container rolling stock, concentrated animal feeding operation, or vessel or other floating craft. *from which pollutants are or may be discharged.* . . .(Emphasis supplied) 33 U.S.C. 1362(14).

[1] It would be a strained construction of unambiguous language for the Court to interpret that the release or firing of ordnance from aircraft into the navigable waters of Vieques is not ". . . any addition of any pollutant . . . from any point source . . .", particularly in view of the broad rather than narrow interpretation given to this type of statute, *United States* v. *Standard Oil Co.*, 384 U.S. 224 (1966); *United States* v. *Republic Steel Corp.*, 362 U.S. 482 (1960); *Minnehaha Creek Watershed District* v. *Hoffman*, 597 F.2d 617, 625 [13 ERC 1009] (C.A. 8, 1979); *United States* v. *Hamel*, 551 F.2d 107, 112 [9 ERC 1932] (C.A. 6, 1977); *United States* v. *Asland Oil and Transportation Co.*, 504 F.2d. 1317, 1328–1329 [7 ERC 1114] (C.A. 6, 1974). We are forced to so conclude notwithstanding the fact that the agency charged with administration of this Act, the Environmental Protection Agency, does not appear to have any regulation which provides for the issuance of a NPDES permit under circumstances such as herein presented, and further notwithstanding that we find that no credible evidence was presented to the Court to the effect that any of the materials deposited in the waters surrounding Vieques as a result of the aforementioned activities has had any measurable deleterious effects has had environment, or on the quality of the surrounding waters, from a scientific vis-a-vis a legal standpoint. Nevertheless, we hold that as the Act now reads, Defendant Navy is required to have an NPDES permit to cover the accidental or intentional release or firing of ordnance into the areas herein discussed. *Train* v. *Colorado Public Interest Group*, 426

U.S. 1, 7 [8 ERC 2057] (1976); *E.P.A.* v. *State Water Resources Control Board*, 426 U.S. 200, 205 (1976).

The second aspect of this issue is called into play by the provisions of 33 U.S.C. 1323(a), which states:

> "Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result in the discharge or runoff of pollutants and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and *to the same extent as any non-governmental entity*, including the payment of reasonable service charges . . ." (Emphasis added).

It is the contention of Plaintiffs that accidental and intentional ordnance dropping into the water areas previously indicated violates various Puerto Rican legislation, namely the Water Pollution Control Act (24 L.P.R.A. 591 et seq.) the Public Policy Environmental Act (12 L.P.R.A. 1121, et seq.) and the Water Pollution Control Regulation, promulgated thereunder.

The Public Policy Environmental Act, supra, is a statute which, as the title implies, generally sets out the Commonwealth's environmental posture and establishes the Environmental Quality Board to administer it. There is little of a specific nature in this statute on which we can hang our legal hat for purposes of the present issue.

It is in the Water Pollution Control Act, supra, that we find a specific relevant prohibition (24 L.P.R.A. 595):

> "It shall be unlawful for any person directly or indirectly, to throw, discharge, pour, or dump, or permit to be thrown, discharged, poured or dumped into the waters, any organic or inorganic matter capable of polluting or of leading *to the pollution* of said waters in such manner as to place them out of the *minimum standards of purity* that the [Environmental Quality

> Board][42] may establish under section 599 of this title." (Emphasis supplied).

That statute defines "pollution" as follows: (24 L.P.R.A. 591 (i):

> " 'To pollute', with reference to *waters*, means *making them in any way noxious* to human health, or to that of animals vegetables or fish, or rendering them ill-smelling or impure, all *according to the permissible standards of purity or impurity* heretofore or hereinafter established as provided herein. "Pollution' has this same meaning." (Emphasis supplied).

"Discharge" is defined as (24 L.P.R.A. 591(j)):

> ". . . [T]he terminal of a sewer system, large or small, collective or individual, or of a discharge of industrial refuse or any other kind of refuse, where it emerges to be dumped into the waters."

This language, together with that statute's definition of "sewage",[43] "industrial waste"[44] and "other[s][45] kinds of refuse leads us to conclude that the prohibited acts under the Puerto Rican legislation are narrower in scope than those under the "Act."

To begin with, upon reading this statute we are left with the clear impression that it is only meant to cover normal endeavors of human activity producing sewage and indus-

---

[42] 12 L.P.R.A. 1132(b).

[43] "*Sewage, sewer water*, mean human and animal wastes, intestinal and other, dragged by water flowing from houses, residences, buildings, industrial establishments and other places, whether alone or mingled with surface or land waters. The mingling of industrial or other wastes with sewage or sewer waters shall be considered included under this term." (Emphasis in the original).

[44] "*Industrial waste* is any liquid, gaseous, or solid refuse, or a combination of all, resulting from any industrial, manufacturing, commercial or business process, or from the processing of any new material or natural wealth." (Emphasis in the original)

[45] "*Others* in connection with wastes, include garbage, residues, rotten wood, saw dust, filings, lime, ashes, offals, oil, dyes, acids, chemical substances and any other substance that may pollute or cause the pollution of waters." (Emphasis in the original).

trial water through pipes and similar devices, and not military operations of the type here in question.[46] Apart from that however, the activity has to either make the water noxious to humans, animals, etc, or violate specific standards of water purity.

We have already stated that no credible evidence was adduced establishing that the activities of Defendant Navy have made the *water* noxious. Thus assuming it was the intention of the Puerto Rican Legislature to apply this statute to the naval operations of the Defendant Navy in Vieques, we must look to the regulations to determine whether a standard of purity established thereunder has been violated.

Plaintiffs rely on the applicability of the "Water Quality Standards Regulations" of Plaintiff Environmental Quality Board.[47] This regulation is intended to promulgate water quality standards for the coastal and surface waters of

---

[46] This is reinforced by the definition of "harmful substance" and "spillage" contained in the Public Policy Environmental Act (12 L.P.R.A. 1141(c) and (b):

" 'Harmful substance'—Those substances which by their nature may, in the event of spillage, cause damage to the environment including without being limited to, substances such as petroleum and its derivatives."

"Spillage"—Discharge, emission or expelling, whether accidental or intentional, of harmful substances from any kind of ship through pipelines or by any other means, into high seas or other bodies of water in Puerto Rico."

[47] According to this document, the regulation was filed in the Department of State of the Commonwealth of Puerto Rico on January 4, 1974, and later amended in May, 1974 and October, 1976. The Political Code of Puerto Rico provides (3 L.P.R.A. § 1046) that regulations filed with the Department be published in two newspapers of general circulation and in the "Commonwealth of Puerto Rico Register" ("Boletin del Estado Libre Asociado de Puerto Rico"). It does not appear that this regulation or the amendments were ever published in the Register. The Department has discontinued publishing the Register since 1972 for alleged lack of funds. The prior regulation is found at 24 R & R 598-1 et seq., and is substantially different in parts from the regulation assumed to be in effect by all parties.

Puerto Rico, (Art. 3), and prohibits the pollution[48] of these waters (Art. 4.1.1) or the discharge of any water pollutant (Art. 4.1.2).

The water quality standards are the following:

"2.1 *General* water quality standards. All waters shall meet generally accepted aesthetic qualifications and shall be capable of supporting diversified aquatic life. These waters shall, except as specifically noted, meet the following quality standards:

2.1.1 Solids and other matter. The waters of Puerto Rico shall not contain materials attributable to *discharges* that will settle to form objectionable deposits. Nor will they contain floating debris, scum, oil and other floating materials attributable to *discharges* in amounts sufficient to be unsightly or deleterious.

2.1.2 Color, odor, taste or turbidity. The waters of Puerto Rico shall be free from color, odor, taste or turbidates attributable to *discharges* in such a degree as to create a nuisance.

2.1.3 Substances in toxic concentrations thereof The waters of Puerto Rico shall not contain substances in concentrations or combinations which are toxic or which produce undesirable physiological responses in human, fish or other animal life, and plants.

A. *Specific standards* for some substances:

i) Coastal waters The maximum allowable concentrations of certain substances in the receiving coastal waters shall be the following:

---

[48] The definition of "pollution" in the regulation is slightly different from that in the statute: "Pollute (to), Pollution. Altering the natural characteristics of a body of water so as to make it in any way harmful or noxious to human health, or to that of animals, or plants, or rendering it ill-smelling or impure or altering adversely its physical, chemical, microbiological or radioactive condition, in such a way as to interfere with the standards of purity established by this Regulation." Art. 1.

Substance	Limit (mg/1)
Arsenic (As)	0.15
Barium (Ba)	1.0
Boron (B)	4.8
Cadmium (Cd)	0.005
Carbon (Chloroform extract)	28.0
Chromium (hexavalent (Cr.)	0.05
Chromium (trivalent (Cr.)	0.30
Copper (Cu)	0.05
Cyanide (CN)	0.01
Detergents (Methylene Blue (Active Substances)	0.5
Fluorides (F)	1.3
Iron (Fe)	0.200
Lead (Pb)	0.015
Manganese (Mn)	0.100
Mercury (Hg)	0.001
Nitrogen ($NO_3NO_2NH_3$)	5.0
Phenols	.010
Selenium (Se)	0.01
Silver (Ag)	0.001
Sulfate (SO_4)	2800.
Uranil (UO_2)	0.500
Zinc (Zn)	0'050"

(Emphasis Supplied.)

Defendant Navy makes much ado about the unconstitutional vagueness of these provisions. See *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926); *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 (1961); but see: *Cerame Vivas* v. *Secretary of Health*, 99 P.R.R. 44 (1976). However, this is an issue we need not decide as this regulation is clearly inapplicable to Defendant Navy's operations presently at issue.

The key word in the quality standards reproduced above is "discharges." The regulation defines this term as follows:

> " 'Discharge (to), Discharge'—The outflow of *wastewater* from any domestic, commercial, industrial, agricultural or any other source into receiving waters." (Emphasis supplied). Art. I.

When we seek the definition of "wastewater" in the regulation we are referred to the definition of "municipal wastes", which states:

> "Water carrying human and animal wastes from homes, buildings, industrial establishments and other places alone or in combination with industrial wastes." (Art. I.

We see no plausible way of interpreting the accidental or intentional bombing or shelling of the coastal waters as falling within the proscribing language of the regulation. This of course, is in keeping with our prior interpretation of the language of the Statute which authorizes this regulation.

Furthermore, the record is barren of any credible evidence which would support a finding that Defendant Navy has conducted any activity violative of the specific standards of Article 2.1.3 Ai) of this Regulation or that the waters in question do not "meet generally accepted aesthetic qualifications" or are not "capable of supporting diversified aquatic life." In fact, if anything, these waters are as aesthetically acceptable as any to be found anywhere, and Plaintiffs' witnesses unanimously testified as to their being the best fishing grounds in Vieques.

C. *The Marine Protection, Research and Santuaries Act*

Plaintiffs' claim to the effect that Defendant Navy's activities violate the Marine Protection, Research and Sanctuaries Act, also known as the "Ocean Dumping Act", and referred to in this section as the "Act", 33 U.S.C. 1401 *et seq.*, are clearly without merit. It is Plaintiffs' contention that Defendant Navy's discharge of ordnance in the waters off Vieques as well as related activities during the course of military operations, constitute "dumping" which requires a permit from the Environmental Protection Agency, a permit which Defendant Navy lacks.

It cannot be disputed but that the complained of activities are incidental to military training exercises and that the purpose of Defendant Navy's activities are said exercises rather than the disposal of waste.

The definition of "dumping" contained in the Act excludes ". . . the intentional placement of any device in ocean waters or on the submerged land beneath such waters, for a purpose other than disposal, which . . . such placement . . . occurs pursuant to an authorized Federal . . . program." 33 U.S.C. § 1402(f). This language, together with the legislative history of the Act, leave no doubt but that Congress intended to prohibit *purposeful disposal of waste*. See 1972 U.S. Code Cong. Adm. News, pp. 4234 *et seq*. The report of EPA Administrator William D. Ruckelshaus specifically states:

> "Special note should also be made of the fact that 'dumping' as defined in subsection 3(g) would not include an activity which has as its primary purpose a result other than 'a disposition of material' but which involves the incidental depositing of some debris or other material in the relevant waters. *For example, material from missiles and debris from gun projectiles and bombs ultimately come to rest in the protected waters. Such activities are not covered by this Act.*" Supra, p. 4255–6. (Emphasis supplied).

D. *Allegations under the Resource Conservation and Recovery Act.*

The allegations of Plaintiffs pursuant to the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 *et seq*. hereinafter referred to in this Section as the "Act" are equally without substance. A reading of this statute as well as its legislative history establishes beyond any question that Congress' intended targets were the evils brought about by "solid wastes" and "hazardous wastes" as *therein* defined.[49]

---

[49] The Congressional findings contained in 42 U.S.C. 6901 are particularly illustrative of this point:

> "(a) *Solid waste*. The Congress finds with respect to solid waste.
>
> (1) that the continuing technological progress and improvement in methods of manufacture, packaging, and marketing of consumer products has resulted in an ever-mounting increase, and in a

"Solid Waste" is defined as:

". . . [A]ny garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other *discarded material*, including solid, liquid, semisolid, or contained gaseous material *resulting from industrial, commercial, mining and agricultural operations, and from community activities* . . ." (Emphasis supplied). See 42 U.S.C. 6903(27).

---

change in the characteristics, of the mass material discarded by the purchaser of such products.

(2) that the economic and population growth of our Nation, and the improvements in the standard of living enjoyed by our population, have required increased industrial production to meet our needs, and have made necessary the demolition of old buildings, the construction of new buildings, and the have required increased industrial production to meet our needs, and have made necessary the demolition of old buildings, the construction of new buildings, and the provisions of highways and other avenues of transportation, which together with related industrial, commercial, and agricultural operations, have resulted in a rising tide of scrap, discarded, and waste materials;

(3) that the continuing concentration of our population in expanding metropolitan and other urban areas has presented these communities with serious financial, management, intergovernmental, and technical problems in the disposal of solid wastes resulting from the industrial, commercial, domestic, and other activities carried on in such areas;

(4) that while the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies, the problems of waste disposal as set forth above have become a matter national in scope and in concern and necessitate Federal action through financial and technical assistance and leadership in the development, demonstration, and application of new and improved methods and processes to reduce the amount of waste and unsalvegeable materials and to provide for proper and economical solid-waste disposal practices.

(b) *Environment and health.*—The Congress finds with respect to the environment and health, that

(1) although land is too valuable a national resource to be needlessly polluted by discarded materials, most solid waste is disposed of on land in open dumps and sanitary landfills;

With one exception which will be presently discussed, it is obvious that Defendant Navy's military activities, although causing the incidental depositing of debris are not the discarding of material nor are they the result of an industrial, commercial, mining or agricultural operation.

---

(2) disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment;

(3) as a result of the Clean Air Act, the Water Pollution Control Act, and other Federal and State laws respecting public health and the environment, greater amounts of solid waste (in the form of sludge and other pollution treatment residues) have been created. Similarly, inadequate and environmentally unsound practices for the disposal or use of solid waste have created greater amounts of air and water pollution and other problems for the environment and for health;

(4) open dumping is particularly harmful to health, contaminates drinking water from underground and surface supplies, and pollutes the air and the land;

(5) hazardous waste presents, in addition to the problems associated with non-hazardous solid waste, special dangers to health and requires a greater degree of regulation than does non-hazardous solid waste; and

(6) alternatives to existing methods of land disposal must be developed since many of the cities in the United States will be running out of suitable solid waste disposal sites within five years unless immediate action is taken;

(c) *Materials.*—The Congress finds with respect to materials, that:

(1) millions of tons of recoverable material which could be used are needlessly burned each year;

(2) methods are available to separate usable materials from solid waste; and

(3) the recovery and conservation of such materials can reduce the dependence of the United States on foreign resources and reduce the deficit in its balance of payments.

(d) *Energy.*—The Congress finds with respect to energy, that

(1) Solid waste represents a potential source of solid fuel, oil, or gas that can be coverted into energy;

(2) the need exists to develop alternative energy sources for public and private consumption in order to reduce our dependence on

"Hazardous waste" is in turn defined as:

> "[A] *solid waste or combination of solid wastes,* which because of its quantity, concentration or physical, chemical, or infectious characteristics may—
>
> (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible illness; or
>
> (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." (Emphasis supplied). See 42 U.S.C. 6903(5).

Even assuming that Plaintiffs have otherwise met the substantial burden placed upon them by sub-paragraphs (A) and (B) of this definition, a fact which is far from certain, the scope of this definition in referring to "solid waste", a term of art under this Act, excludes *military* hazardous wastes from its coverage.

Plaintiffs next rely on the "Regulation for the Control of Solid Waste" promulgated by Plaintiff Environmental Quality Board.[50] Plaintiffs allege that this regulation is applicable to Defendant Navy's activities by virtue of 42 U.S.C. 6961, which states:

> "Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any *solid waste management facility* or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal of *solid waste* or *hazardous waste* shall be subject to, and comply with, all Federal, State, insterstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for permits re-

---

such sources as petrolemm products, natural gas, nuclear and hydroelectric generation; and

(3) technology exists to produce usable energy from solid waste."

See also 1976 U.S. Code Cong. and Adm. News, pp. 6238 *et seq.*

[50] See footnote 47.

porting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief) respecting control and abatement of *solid waste* or *hazardous waste* disposal in the same manner, and to the same extent, as any person is subject to such requirements, . . ." (emphasis supplied).

The military activities of Defendant Navy, with one exception, fall outside of the scope of this delegation. Within the Act's definition of the term "solid waste management facility" we find that it includes "any facility for the treatment of solid wastes, including hazardous wastes, whether such facility is associated with facilities generating such wastes or otherwise." 42 U.S.C. 6903(29). Considering this definition together with the definition of "solid waste", which as previously indicated, includes "discarded material . . . resulting from *community activities* . . ." (emphasis supplied, 42 U.S.C. 6903(27), it becomes apparent that the Commonwealth's regulation is applicable to a single trench landfill operated by the Marines in Camp García for the disposal of food waste and packaging material. As to this, the evidence presented during the trial shows that on October 16, 1978, Defendant Navy applied to the Environmental Quality Board for a solid waste facility operating permit.

E. *The Rivers and Harbors Act*

Plaintiffs seek injunctive relief alleging that Defendant Navy has violated the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401 *et seq.*, hereinafter called the "Act" in this Section. More specifically, Plaintiffs claim that Defendant Navy has without a permit from the Corps of Engineers thrown, discharged or deposited refuse material in the navigable waters of the United States in violation of Section 13 of the Act (33 U.S.C. § 407), and also without a permit, has sunk vessles and other craft in the vicinity of Vieques in violation of Section 15 of the Act (33 U.S.C. § 409).

[2] The short answer to these contentions is that Plaintiffs lack standing to sue for these alleged violations.

In differentiation to other statutes involved in this

case,[51] the "Act" not only fails to provide for a private right of action to enforce its provisions, but in fact preempts the field in favor of *public* enforcement. Thus 33 U.S.C. § 413 clearly and expressly mandates that:

> "The Department of Justice shall conduct the legal proceedings necessary to enforce the provisions of Sections 401, 403, 404, 406, 407, 408, 409, 411, 549, 686, and 687 of this title; . . . (Emphasis supplied).

Plaintiffs rely on *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191 (1967), for the proposition that in addition to the criminal sanctions of this penal statute, they as private parties are allowed to seek injunctive relief for its alleged violation. But this case far from supporting this proposition concludes that it is the *United States* that has the right to injunctive relief in aid of protecting a public interest expressed in a statute containing criminal penalties for its violation. The Court there said (389 U.S. 201–202, citations omitted):

> "Article I, § 8, of the Constitution grants to Congress the power to regulate commerce. For the exercise of this power, the navigable water of the United States are to be deemed the "public property of the nation, and subject to all the requisite legislation by Congress.' The Federal Government is charged with ensuring that navigable waterways, like any other routes of commerce over which it has assumed control, remain free of obstruction. The Rivers and Harbors Act of 1899, an assertion of the sovereign power of the

---

[51] See e.g.: Section 505 of the Federal Water Pollution Control Act, 33 U.S.C. § 1365; Section 11 of the Endangered Species Act, 16 U.S.C. § 1540(g) (1); Section 7002 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972; and Section 304 of the Clean Air Act, 42 U.S.C. § 7604. Recently the Supreme Court has stated: "When Congress intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as such when it creates those rights." *Cannon* v. *University of Chicago*, ___ U.S. ___ (Slip Opinion, May 14, 1979) p. 38. Exceptions to Congress' failure to specify a private cause of action are both "limited" and "typical." Id. Here the language of Section 413 is indicative of legislative intent for public rather than private enforcement.

United States, was obviously *intended to prevent obstructions in the Nation's waterways.* Despite some difficulties with the wording of the Act, we have consistently found its coverage to be broad. And *we have found that a principal beneficiary of the Act, if not the principal beneficiary, is the Government itself.*

"Our decisions have established, too, the general rule that the *United States* may sue to protect its interests. This rule is not necessarily inapplicable when the particular government interest sought to be protected is expressed in a statute carrying criminal penalties for its violation. Our decisions in cases involving civil actions of private parties based on the violation of a penal statute so indicate. In those cases we concluded that criminal liability was inadequate to insure the full effectiveness of the statute which Congress had intended. *Because the interest of the plaintiffs in those cases fell within the class that the statute was intended to protect, and because the harm that occurred was of the type that the statute was intended to forestall, we held that civil actions were proper.* That conclusion was in accordance with a general rule of the law of torts. We see no reason to distinguish the Government, and to deprive the *United States* of the benefit of that rule.

The inadequacy of the criminal penalties explicitly provided by § 16 of the Rivers and Harbor Act is beyond dispute. That section contains only meager monetary penalties. In many cases, as here, the combination of those fines and the Government's *in rem* rights would not serve to reimburse the *United States* for removal expenses. It is true that § 16 also provides for prison terms, but this punishment is hardly a satisfactory remedy for the pecuniary injury which the negligent ship owner may reflect upon *the sovereign.*" (Emphasis supplied).

It is clear that this case does not support Plaintiffs' standing under the Act to seek *private* injunctive relief. See *Cort* v. *Ash*, 422 U.S. 66, fn. 11 (1974); *Cannon* v. *University of Chicago*, supra at fn. 13 and (J. Powell, dissenting) fn. 3.

We decline the invitation to follow *Natural Resources Defense Council Inc.* v. *Grant*, 355 F. Supp. 280 [5 ERC 1001] (E.D.N.C., 1973) and *People of the State of Illinois Ex Rel. Scott* v. *Hoffman*, 425 F. Supp. 71 [11 ERC 1049] (S. D. Ill., 1977), as in our opinion they run contrary to the controlling language of 33 U.S.C. 413 and to the greater weight of authority. The Second, Third, Fourth, Fifth, and Seventh Circuits have all expressed themselves as finding no provate causes of action under different sections of the Rivers and Harbors Act, see: *Connecticut Action Now, Inc.* v. *Roberts Plating Co.*, 457 F.2d 81 (C.A. 2, 1972); *Red Star Towing & Transportation Co.* v. *Department of Transportation*, 423 F.2d 104, 105 (C.A. 3, 1970); *Hughes* v. *Ranger Fuel Corp.*, 467 F.2d 6,8 n.1 (C.A. 4, 1972);[52] *Guthrie* v. *Alabama By Products*, 456 F.2d 1294 (C.A. 5, 1974) cert. den. 410 U.S. 946 (1973);[53] *Jacklovich* v. *Interlake, Inc.*, 458 F.2d 923 (C.A. 7, 1972). Besides *Grant*, supra, and *Hoffman, supra*, only the Ninth Circuit in *Riggle* v. *State of California*, 577 F.2d 579 6, 8 (C.A. 9, 1978),[54] and in two lower court decisions, *Sierra Club* v. *Morton*, 400 F.Supp. 610, 622–623 [4 ERC 1561] (N.D.Cal. 1975); *Sierra Club* v. *Leslie Salt Co.*, 354 F.Supp. 1099, 1104–05 [4 ERC 1663] (N.D. Cal., 1972), have recognized private causes of action under this "Act." All other lower court case law is decidely against recognizing such a right. *Township of Long Beach* v. *City of New York*, 445 F.Supp.

---

[52] The Fourth Circuit may have implicitly recognized such a right by affirming three lower court decisions without discussion on this point, see: *Rucker* v. *Willis*, 358 F.Supp. 425 (E.D.N.C. 1973) aff'd 484 F.2d 158 (1973); *River* v. *Richmond Metropolitan Authority*, 359 F.Supp. 611 (E.D. Va. 1972) aff'd. 481 F.2d 1280 (1973); *Lauritzen* v. *Chesapeake Bay Bridge and Tunnel District*. 259 F.Supp. 633 (E.D.Va. 1966) aff'd 404 F.2d 1001 (1968).

[53] *But cf: Neeches Canals Co.* v. *Miller & Vidor Lumber Co. 24 F.2 763 (C.A. 5, 1928) with Intercoastal Transportation, Inc.* v. *Decatur County, Georgia*, 482 F.2d 36 fn. 14 (C.A. 5, 1973).

[54] *Cf. also: Ameda Conservation Association v. California* 437 F.2d 1087 [2ERC 1175] (C.A. 9, 1971). cert den. 402 U.S. 908 [2 E.R.C. 1910] (1971).

1203 [11 ERC 1417] (D.N.J. 1978); *Loveladies Property Owners Ass'n.* v. *Raab*, 430 F.Supp. 276, 281 [10 ERC 1242] (D.N.J., 1975) aff'd unreported decision, 547 F.2d 1162 (C.A. 3 1976) cert. den. 432 U.S. 906 [10 ERC 1249] (1977); *Parsell* v. *Shell Oil Co.*, 421 F.Supp. 1275 [9 ERC 2066] (D. Conn., 1976); *Burgess* v. *M/V Tamano*, 373 F.Supp. 839, 845 [5 ERC 1914] (D. Me., 1974); *Gerbing* v. *I.T.T. Rayonier Incorporated*, 332 F.Supp. 309 (M.D. Fl. 1971); *Hooper* v. *United States*, 331 F.Supp. 1056, 1058 (D.Conn. 1971); *Bass Anglers Sportman's Society* v. *Scholze Tannery Inc.*, 329 F.Supp. 339 [2 ERC 1771] (E.D. Tenn. 1971); *United States ex. rel. Mattson*, 327 F.Supp. 87 [2 ERC 1566] (D. Minn., 1971); *Enquist* v. *Quaker Oats Company*, 327 F.Supp. 347 [2 ERC 1601] (D.Neb. 1971); *Bass Anglers Sportsman Society* v. *Plywood Champion Papers, Inc.*, 324 F.Supp. 302 [2 ERC 1298] (S.D.Tex. 1971); *Bass Anglers Sportman Society* v. *United States Steel Corp.* 324 F.Supp. 412 (N.D., M.D., and S.D. Ala. 1971) aff'd. 447 F.2d 1304 (C.A. 5, 1971); see also: *H. Christiansen & Sons, Inc.* v. *City of Duluth*, 154 F.2d 205 (C.A. 8, 1946). Contra see: *Potomac River Association, Inc.* v. *Lundeberg Maryland Seamanship School, Inc.*, 402 F.Supp. 344 [7 ERC 1945] (D.Md. 1975).

While we hold that sounder law dictates a finding that no private cause of action is created by the Rivers and Harbors Act, as is clear from the above citations, we are not unmindful of the division of authority on this point. As mentioned Plaintiffs specifically allege violations under Sections 13 and 15 of this Act, 33 U.S.C. §§ 407, 409. Section 13 of this Act, also commonly known as the "Refuse Act" generally prohibits the "discharge, or deposit, [*of*] . . ., any refuse matter of any kind or description. . ., into any navigable water of the United States" without a permit from the Secretary of the Army. It may be true that Defendant Navy's release of ordnance in the navigable waters surrounding Vieques could constitute "refuse matter" under Section 407, *United States* v. *Standard Oil*, 384 U.S. 224 [1 ERC 1033] (1966); *United States* v. *Republic Steel Corp.*, 362 U.S. 482 [1 ERC 1022] (1960). But even so assuming any relief that we could enter for this violation would be

only superfluous and cumulative. We have hereinbefore found that under the Federal Water Pollution Control Act the Defendant Navy must secure a permit for the release or firing of ordnance into the surrounding waters. An NPDES permit under the pollution act is the same permit required under Section 407 of the Rivers and Harbors Act, see: 33 U.S.C. § 1342(a)(4), (5). Relief entered under the pollution act and any relief that might be entered under Section 407 would necessarily be identical.

Plaintiffs also argue that Defendant Navy is in violation of Section 409 of this Act. Said Section makes it unlawful

> " . . . to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; or to voluntarily, or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; . . ."

Plaintiffs' contention in this regard centers on the sinking of the U.S.S. Killan, a landing barge, in the waters of Vieques. See n. 29, supra. The short answer to these allegations is that the record contains no evidence establishing any obstruction to navigation or that any other vessels plying these waters are endangered by this. In fact the state of this vessel is such as may be classified as "broken up", cf. 33 U.S.C. § 414, and constitutes no safety hazard. Moreover, the environmental effects of this sinking, if any, are essentially minimal.

F. *Claims under the Federal Clean Air Act*

Plaintiffs Romero Barceló, et al, Medina, et al, and Zenón, et al, claim that Defendant Navy's activities violate the Federal Clean Air Act, 42 U.S.C. 7401 *et seq.* (hereinafter called the "Act" in this Section) and Executive Order 11752. It is alleged that this statute requires that the departments of the executive branch of the Federal government comply with local requirements regulating the control and abatement of air pollution, but that Defendant Navy's activities, particularly the use of ordnance and the bulldozing and maintenance of unpaved roads, violate the

"Regulation for the Control of Atmospheric Pollution" promulgated by the Plaintiff Environmental Quality Board, especially as related to so-called "fugitive dust."

It cannot be seriously questioned but that, under appropriate circumstances, the Act requires the Federal Government to comply with State substantive and procedural requirements related to air pollution. 42 U.S.C. § 7418(a) (West Supp. 1977).[55] *People of State of Cal., etc.* v. *Dept. of Navy*, 431 F. Supp. 1271 [9 ERC 2077] (N.D. Cal., 1977). The issue is whether the matters claimed herein are such an appropriate circumstance.

The regulation in question[56] states that . . . [n]o person shall cause or permit air pollution as defined in Article 1." Art. 2.1.1. "Air pollution" is defined as:

> "The presence in the outdoor atmosphere of one or more *air pollutants in such quantities and duration* as is or could be injurious to human health or welfare,

---

[55] This provision states:

> "Each department, agency and instrumentality of the executive . . . branch[es] of the Federal Government (1) having jurisdiction over any property or facility or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, and each officer, agent or employee thereof, shall be subject, to and comply with, all . . . State, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any record keeping or reporting requirement, any requirement respecting permits and any other requirement whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents or employees under any law or rule of law. No officer, agent or employee of the United States shall be personally liabile for any civil penalty for which he is not otherwise liable."

[56] We are faced with a problem respecting this regulation similar to that discussed in Footnote 47 and 49.

animal or plant life, or property, or which interferes with the enjoyment of life or property." (Emphasis supplied). Art. 1.

"Air pollutant" includes:

"Dust, fumes, mist, smoke, other particulate matter, vapor, gas odorous substances, or any combination thereof, but not including uncombined water vapor." Art. 1.

As to "fugitive dust" the regulation states that it is:

"Solid airbone (sic) particulate matter from any source other than through a stack."

Article 5.2.1, which specifically deals with fugitive dust, states:

"No person shall cause or permit any materials to be handled, transported or stored; or a building, its appurtenances, or a road to be used, constructed, altered, repaired or demolished without taking reasonable precautions to prevent particulate matter from becoming airborne. . . ."

Another section of this regulation requires that:

"No person shall cause or permit the discharge of visible emissions of fugitive dust beyond the lot line of the property on which the emissions originate." (Art. 5.2.2.)

In our opinion nothing but sheer speculation would support a finding that Defendant Navy's emissions of "fugitive dust" are "in such quantities and duration as is or could be injurious to human health or welfare, animal or plant life or property." Although Defendant Navy's activities undoubtedly produce "dust, fumes . . . [and] smoke . . ." in what we consider to be relatively limited amounts[57] and of short duration, Plaintiffs fall considerably short of their burden in having failed to show in any convincing fashion any deleterious effect to humans, or otherwise, of the "fugitive dust" caused by the objected activities of Defendant Navy,

---

[57] Based on observation by the Court of bombing runs, as well as photographs introduced in evidence.

much less that there are "visible emissions . . . beyond the lot line of the property on which the emissions originate."

In fact the "hard" evidence is to the contrary. Although the Environmental Protection Agency inspected the Camp García facility on November 1977, and March 1978 for air pollution matters, no "fugitive dust" was noted as a problem in either report. Existing studies by Plaintiff Environmental Quality Board (EQB) show no violation of the federal standards for 24-hours maximum allowable concentration of particulate matter in either Isabel Segunda or Esperanza. A nineteen-day study in 1972 conducted by the EOB in Isabel Segunda, found the background level for particulate matter at 80 micrograms per cubic meter, far less than the allowable concentration, which is 150 micrograms per cubic meter, or than the national secondary standard for 24-hour maximum allowable concentration, which is 150 micrograms per cubic meter. Furthermore, the measurements of sulfur dioxide, nitrogen oxide, ozone, hydrocarbons and particulates did not show any violation of national ambient air quality standards in either Isabel Segunda or Esperanza. Another sampling conducted by the E.Q.B. at Esperanza throughout May 25–June 6, 1978, showed an average of 99 micrograms per cubic meter at Esperanza as compared to only 25.9 microgram per cubic meter at the impact area, again in neither case exceeding the 24-hour maximum allowable concentration.

[3] Of course, we have throughout this discussion been assuming that Plaintiffs are on sound footing procedurally, a situation which unfortunately for Plaintiffs, is not the case. Although for many sources of air polluting emissions the states are allowed to continue enforcing their own laws and regulations (42 U.S.C. § 7416),[58] a citizen's suit such as

---

[58] In its pertinent parts this section reads as follows:

"[N]othing in this chapter will preclude or deny the right of any State or political subdivision thereof to adopt or enforce

(1) any standard or limitation respecting emissions of air pollutants or

the present one under the provisions of 42 U.S.C. § 7604(a), must be based on the violations of a *specific* emission *standard or limitation. Citizens for Clean Air, Inc.* v. *Corp. of Engineers*, 356 F. Supp. 14 [5 ERC 1102] (S.D.N.Y. 1973).

This section provides that:

> "(a) . . . [A]ny person may commence a civil action on his own behalf—(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or *limitation* under this chapter or (B) an order issued by the Administrator or a state with respect to *such a standard or limitation* . . ." (Emphasis supplied) . . . .

Under 42 U.S.C. 7606(f) "emission standard or limitation" is defined as:

> ". . . (1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard,
>
> (2) a control or prohibition respecting a motor vehicle fuel or fuel additive, or
>
> (3) any condition or requirement of a permit . . any condition or requirement . . . (relating to certain enforcement order) . . . any condition or requirement under an applicable implementation plan relating to transportation control measures, air quality maintenance plan, vehicle inspection and maintenance programs or vapor recovery requirements, . . . (relating to fuel and fuel additives) . . . [and] (relating to visibility protection, any condition or requirement . . . (relating to ozone protection) or any requirement . . . (without regard to whether such requirement is expressed as an emission standard or otherwise)."

This definition does not incorporate a local regulation such as the one here in question dealing with "fugitive dust" and which in fact contains no quantitative limitation. Therefore,

---

(2) any requirement respecting control or abatement of air pollution . . . ."

no citizens suit lies under the Act for enforcement of the regulation in question. *Citizen for Clean Air Inc.* v. *Corps. of Engineers U.S. Army*, supra.

G. *The Noise Control Act claims*

It is the contention of Plaintiffs that Defendant Navy's military activities (shelling, bombing, artillery practice and aircraft and helicopter overflights) "generate noise [and shock waves] that unreasonably interfere[s] with the welfare of the residents on the island" in violation of the Noise Control Act of 1972, 42 U.S.C. § 4901 *et seq.*, referred to as the "Act" in this section.

This Statute directs Federal agencies, "to the fullest extent consistent with their authority" to carry out the programs within their control in such a manner as to further the Act's noise abatement policies, namely,". . . to promote an environment for all Americans free from noise that jeopardizes their health or welfare." See 42 U.S.C. §§ 4901, 4903(a). The Act requires that:

> "Each department, agency or instrumentality of the executive legislative, and judicial branches of the Federal Government—(1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the emission of noise, shall comply with Federal, State, interstate and local *requirements respecting control and abatement of environmental noise* to the same extent that any person is subject to such requirements . . ." (See 42 U.S.C. 4903(b)). (Emphasis supplied).

Executive Order 11752 (38 Fed. Reg. 34793, Dec. 17, 1973) in substance requires this same action from Federal agencies.

Plaintiffs' principal reliance for their contentions is placed on Puerto Rico's criminal nuisance statute, 33 L.P.R.A. § 1365, which states that:

> "Anything which is injurious to health or is . . . offensive to the senses or is an obstruction of the free use of property so as to interfere with the comfortable enjoyment of life or property by an entire community

> or neighborhood or by any considerable number of persons . . . is a public nuisance."

For reasons that are not clear to us, Plaintiffs make no mention of Puerto Rico's civil nuisance law, found at 32 L.P.R.A. § 2761, which would seem to have more relevance than the cited criminal law. The language of this statute is somewhat similar to the penal law:

> "Anything which is injurious to health, . . . or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action. Such action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance, and by the judgment, the nuisance may be enjoined or abated, as well as damages recovered; nothing herein provided shall apply to activities related to public worship in churches practiced by the different religions; provided, that the provisions herein established shall not be construed as a limitation of the Environmental Quality Board to promulgate regulations, as it is authorized by law."

In any event, in our opinion neither the penal or the civil nuisance statutes can be considered as establishing "requirements respecting control and abatement of environmental noise." This language of the Act together with the legislative history of 42 U.S.C. 4903(b) contemplates compliance with *specific standards* existing or to be promulgated by the various jurisdictions. Thus Senate Report No. 92–1160 speaks in terms of "authority to establish and enforce *limits* on environmental noise" and the authority of the ". . States and local governments . . . [*to*] . . . *reach or maintain levels* of environmental noise which they desire through (a) operational limits or regulations or products in use . . .; (b) quantitative limits on environmental noise in a given area which may be enforced against any source within the area . . . (c) regulations limiting the environmental noise which may exist at the boundary of a construction site; (d) nuisance laws; or (e) other devices tailored to the needs of different localities and land uses . . . ." (Emphasis

supplied; see 1972 U.S. Code Cong. and Adm. News p. 4655, 4660).

Conversely, in interpreting the civil nuisance statute the Supreme Court of Puerto Rico held in *Arcelay* v. *Sánchez* 77 P.R.R. 782 (1955), that there are no fixed norms for making a determination of whether a nuisance exists but rather that the resolution of the problem must be decided on a case by case basis, the fundamental question being whether or not the use by the defendant of his property is reasonable, bearing in mind the right of the complainant to enjoy his own property.[59]

Shortly before the end of the trial, Plaintiff Environmental Quality Board promulgated a "Regulation For The Prevention and Control of Noise Pollution", pursuant to authority conferred under the Public Policy Environmental Act of Puerto Rico (12 L.P.R.A. § 1121, *et seq.* at § 1131(12). Although it contains specific noise standards this regulation did not come into effect until after the trial ended.[60]

Irrespective of the above discussion, even under the most liberal interpretation of the Puerto Rican nuisance statute or the quoted noise regulation, Plaintiffs have failed to establish facts attributable to Defendant Navy justifying a conclusion that it is generating noise and shock waves of such magnitude as to interfere with either the health or property of the civilian residents of Vieques. On this issue the Court not only received extensive expert and lay testimony, but conducted a site inspection during actual bombing of the range, for the specific purpose of perceiving subjective sound impressions. In this respect the Court was

---

[59] We need not decide whether these statutes run afoul of Defendant Navy's challenge on the basis of overbroadness and vagueness. *Cf. Smith* v. *Goguen*, 415 U.S. 566 (1974); *Connally* v. *General Construction Co.*, 269 U.S. 385,391 (1926).

[60] The regulation was filed with the Secretary of State on November 24, 1978. Pursuant to its own terms it become effective 30 days *after* said filing, i.e. after the trial ended. See Art. 7.4. See also footnote 47.

present on four different locations: the observation post at Cerro Matías, located approximately 2–3000 yards from the impact points), and three civilian sites, Colonia Lujan, (about 9 miles away) the town square at Isabel Segunda, (about 10 miles distant) and Barrio Santa María (approximately 8 miles distant). During these listening periods the Court was accompanied by experts of all the parties, who had suitable measuring and recording instruments.

Suffice it to say that even during the bombing runs while at the observation post at Cerro Matías, the aircraft-connected sound were "negligible", while this same activity was at best "barely audible" at the Barrio Santa María location.

The sounds of the bombs landing can of course be clearly heard from the observation post. These varied from an instrument recorded 128 decibels (dB) sound, involving the dropping of one MK–82 (500 pounds) bomb, to a high of 137 dB from twenty MK–82 (500 pounds) bombs, which did cause shockwave-induced rattling in the observation post's windows.

The sounds of explosions were not discernible to the human ear from any of the three civilian locations. Although they could be recorded with the aid of instruments at Lujan and Santa María, they were completely inaudible, even by instruments, from the central Plaza at Isabel Segunda.[61] At Luján, using the peak flat sound pressure level (peak flat SPL) scale,[62] with an ambient level[63] of be-

---

[61] This was so even during the times when the nearby church is not blasting its message through its loud speakers, a "nuisance" excluded from coverage of the law by virtue of the proviso in 32 L.P.R.A. 2761. *Cf. Sucn. de Victoria* v. *Iglesia Pentecostal*, 102 D.P.R. 20 (1974).

[62] It has been customary to describe the magnitude of the sound of an explosion by the *peak sound pressure level* as received in a wide frequency band. The four elements are (1) *peak*, signifying the greatest instantaneous sound pressure that exists during a time period under consideration (2) *sound pressure*, which is the variation of atmospheric pressure about the steady atmospheric pressure; an important unit of sound pressure is the pascal (Pa), (3) *level*, which is a logarithm of a sound pressure ratio; the usual unit of level is the decibel (dB), and (4)

tween 83 to 93 dB, the events recorded between 91 and 99.6 dB. On this same location, using the Slow A sound pressure level (Slow A SPL) scale, with an ambient level of between 42 and 53 dB, the events recorded between 45.8 and 53 dB. At Santa María, using the peak flat SPL scale, with an ambient level of between 70 and 92 dB, the re-

---

flat, pertaining to a frequency range wide enough to include the significant frequency components of sound, over which the response of the measuring instrument does not change much with frequency; this range must be specified for each measuring instrument.

Although the above-contained definition of "peak" is simple, it leads to large numbers of measurements to describe the noise in the community. If only the peak sound pressure level in an hour were reported, information would be lost completely about the many different time patterns that could occur, which all have the same peak value. Therefore, it is customary to measure a certain average over one of several standardized time intervals. The averaging time frequency used in a sound level meter is called FAST: it causes the sound level meter to respond primarily to recent sounds (mostly within ⅛ second) almost as quickly as does the ear in judging the loudness of a sound. This measurement is called *fast sound level*.

A standardized slower response is additionally available in the sound level meter; it is called SLOW. It likewise causes the sound level meter to respond primarily to recent sound (mostly within one second). This level is called *slow sound level*.

Noise in the community may vary widely within any given time span. To get a single number to represent all the noise in a longer time period, an average is taken (in a way peculiar to sound level meters) over a minute, hour, day or year. For *average sound level*, equal emphasis is given to all sound within the stated averaging period; whereas for peak, fast, or slow sound level, the emphasis is graduated to put much more emphasis on recently occurring sounds. A time-period average sound level is also called an equivalent continuous sound level.

Because people are annoyed more by sounds at night, a noise descriptor now widely recognized is the *day-night average sound level*. This is the 24-hour average sound level obtained for a given day after addition of ten decibels to sound levels that occur from midnight up to 7 A.M. and from 10 P.M. to midnight.

Sound exposure level is a recently developed measure of the total sound accumulated over a given time period or event. It is not an average. It is particularly appropriate for a discrete event like the explosion of a bomb, the passage of an aircraft or a clap of thunder. In contrast to average sound level which for a steady sound remains

corded events varied between 94.8 and 102.2 dB, but several of the events could not be picked up even with the instruments. On the Slow A SPL scale, with ambient levels of between 48 to 57 dB, none of the events could be heard. The events in question involved up to 8—500 pound bombs simultaneously dropped.

It is an established scientific fact that damage begins to occur to both people (eardrums) and houses (window breakage), at a peak flat SPL of 140 dB. Ground motion damage to structures can begin to occur at 3 millimeters vibrations per second. The above recordings, together with other matters to be discussed, do not establish sound pressures or ground motion levels[64] in the civilian areas anywhere near these levels.

---

constant, the sound exposure level of a steady sound increases continuously with the passing of time.

The ear does not respond equally to sounds of any frequency; it is most sensitive to sounds whose frequency are in the vicinity of 3,000 hertz (cycles per second) near the top of the playing range of a piano. To simulate this ear response, the sound level meter is given the *A-frequency weighting*. A standard sound level meter may contain still other frequency weightings, such as the *C-frequency weighting* which yields essentially the same constant response to sounds of any frequency between 32 and 8000 hertz.

Sound level is the quantity measured by a sound level meter. The unit of sound level and other levels is the decibel (dB). The quantity is actually a sound pressure leve, but since sound pressure is the most commonly measured characteristic of a sound, it is feasable to omit the word "pressure" from the name of the quantity. The A-frequency weighting and the FAST time averaging approximately match the ear; they are understood when the simple term "sound level" is used.

The source for the above definitions and descriptions are pages 3–4 of Technical Note No. 544 of the Naval Ocean Systems Center, San Diego, California, which is entitled "Noise Measurements on Isla de Vieques, 4 April through 6 October 1978", by Dr. Robert W. Young. This is Defendants' Exhibit 62.

[63]This is the level of sound produced by the general area in which the sound measuring of a discrete noise source is to take place.

[64]Interestingly enough, although it is possible by the use of seismographs and other similar instruments to take readings of shock-induced ground movements, Plaintiffs offered no such evidence but relied on

Weather conditions are of great importance to sound and ground motion problems because they can bring about focusing. Under severe focusing conditions the peak flat SPL can be increased by up to 25 dB, and ground motion can be multiplied by a factor of up to 18. Under these weather conditions the predicted levels for Isabel Segunda are marginal for four Mark 83 bombs, which are 1000 pound bombs, detonated simultaneously.[65] Studies indicate that these weather conditions occur less than 10% of the days during the year, and during these days, Defendant Navy takes corrective action.

To prevent excessive noise caused by sound focusing phenomena, Defendant Navy has set up an elaborate noise abatement system for the inner range. Meteorological information from San Juan and St. Martin is collected twice a day and fed into a computer which is programmed to provide a sound focusing prediction for a given explosion. This data can be used for predicting trends of sound focusing on Vieques, but not for predicting absolute magnitudes of sound pressure levels. Thus a supplementary verification

---

so-called eye witness accounts of these phenomena. We do not credit said testimony.

A social survey taken by Plaintiffs on Vieques indicates that nearly 94% of the civilian residents feel that noise is not a problem in their neighborhood. In this same survey however, when the sample was asked about noise from Naval activity, 25% to 30% of the people stated they were highly annoyed. Twice as many people indicated that they would like to have Defendant Navy leave Vieques as those who indicated that they were highly annoyed with noise. This would seem to indicate that there is an attitudinal problem which bears little relation to the polled individual's perception of noise and thus these "eye witness" accounts cannot be deemed reliable when compared to "hard" scientific evidence to the contrary.

[65] Depending on the prediction technique, the air blast could be between 139 and 142 dB, and ground motion, 3.1 mm/sec. Predictions of blast over-pressure from artillery firing from the peninsula near Lujan, a distance of about 5 kilometers, indicate that a peak flat SPL in the range of 108 dB would be produced by a muzzle blast equivalent to 10 pounds. Under extreme focusing conditions, the maximum peak flat SPL would be 133 dB.

system has been set up whereby test bombs are dropped and reports received from listeners located in St. Thomas, St. Croixn Camp García and at the police station in Isabel Segunda. A meter on Crown Mountain in St. Thomas also sends a digital readout to the observation post in Cerro Matías. If the information received establishes high noise levels, operations are modified or curtailed, or in extreme cases, cancelled.

A compilation of the measurement of one-hour average sound levels made by both Plaintiffs and Defendants at 18 sites on Vieques over a six month period;[66] reveals that at all populated areas on Vieques, except Lujan in October, the average day-night average sound level was about 58 dB. An analysis of this information reveals that most of the sound comes from natural sources: the biota, rain and thunder. Activities of local residents appear to be next in order as sound makers.

Twelve graphs of one-hour average sound levels illustrate that on many locations (except Lujan in October), there was a sudden increase in sound just at sunset that is clearly not caused by Defendant Navy's activities. Furthermore, the one-hour average sound level remains high into the early morning hours, long after the cessation of Defendant Navy's military activities. Such night time sounds are well-known to be associated with the mating calls of the Puerto Rican tree frog *(eleutherodoctylus portoricensis)*, also known as the *coquí*. This conclusion is reaffirmed when compared to evidence that the sudden increase in noise at sundown was not recorded on less humid days, a fact scientifically supported in that the *coquí* ceases calling soon after sundown on nights when the relative humidity goes below 85%.[67]

---

[66] Complete 24-hour data were available for 29 days in that six-month period. The day-night average sound level was calculated for each of these days. This is a 24-hour average sound level for which, as previously stated, there is a 10 dB emphasis on sound levels that occur before 7 A.M. and after 10 P.M.

[67] See also *El Coqui: Unico en el Mundo*, by Jorge Luis Leon, "El Mundo", p. 15 A, July 29, 1979.

At Destino, the cumulated sound of big claps of thunder were measured by automatically activated equipment which operated there for ten days to measure the sound exposure levels. The sound exposure levels of two claps of thunder, which were specifically identified by a witness, were respectively 96.7 and 103.6 DB. These levels may be compared with the sound exposure level of 77.6 dB of a 500-pound (Mark 82) bomb at a distance of 3 miles. The difference of more than 20 decibels between the exposure levels of thunder and a bomb, means that the dropping of 100 bombs 3 miles from Destino would cause the same cumulated sound there (and the same average sound level) as would one big clap of thunder. (Thunder at Vieques is common in the summer).

Aircraft noise was measured at Destino while two Naval aircraft (Type A–6, which is a noisier aircraft than the A–7) made 25 northward runs over Target 2 (only inert bombs are dropped on this target); after a run they made a left turn and returned southward, east of Destino, to make another run. Fourteen of the runs triggered the automatic measuring equipment, yielding a typical sound exposure level at Destino, for one A–6 aircraft, of 79.3 dB. Inasmuch as the sound exposure levels of the other 11 runs were less than the smallest one that did activate the automatic measuring system, by the rules for levels, the typical sound exposure level of all 25 of the A–6 aircraft flying southward east of Destino was 76.7 dB.

In 1977–78 the average number of aircraft (all types) making runs on Target 2, and the climbing left turns thereafter, was 37.8 per day. An analysis of the distribution of operations for 20 days in August and September 1978 indicated that 3 per cent of aircraft operations occur after 10 p.m. In view of the 10–dB emphasis on sound levels at night, the yearly day-night average sound level at Destino, due to aircraft, would be 44 decibels.

As noted above, the day-night average sound level at Destino for the six months recorded due to all sources of noise, was about 58 dB. If the yearly aircraft operations described above were stopped entirely, the day-night average

sound level at Destino would drop to 57.8 dB—an insignificant reduction of 0.2 dB.

Naval gunfire at the Vieques target range in September 1978 did not appreciably increase the noise at Destino, and presumably at other populated areas more distant from the guns. The evidence establishes a one-hour average sound level for the hour ending at 1:00 P.M. on September, 1978. This is the highest level at any time during the 10 days of monitoring at the Topside House, at Destino. This high level was due to thunder and rain. During the five hours 1:00 to 6:00 P.M. on September 29, 1978, the one hour average sound levels were respectively 40.3, 46.0, 42.5, 41.3 and 41.0 dB. These are among the lowest in the 10-day period notwithstanding that the Weekly Range Utilization work sheet for September 29, 1978 lists for the same five hours 7,6,4,10 and 0 rounds respectively fired by 5-inch guns. The fact that the one-hour average sound level was 41.0 dB at Destino when there was no gunfire at all, and 41.3 dB with the firing of 10 rounds, means that the gunfire added appreciably nothing to the noise at Destino, even in the quietest hours.

The lowest one-hour average sound level, day or night throughout the 10-day period, was 39.6 dB, for the hour ending at 2:00 P.M. on 30 September 1978. During this quietest hour, 13 rounds were fired by 5-inch guns. This gunfire likewise added nothing significant to the prevailing ambient noise.

According to a report of the National Academy of Sciences entitled "Guidelines for Preparing Environmental Impact Statements on Noise", 1977, the primary measure for describing noise in an environmental impact statement is the day-night average sound level. Various documents of the Environmental Protection Agency have named the day-night average (A-weighted) sound level as the primary measure of noise in the community. A day-night average sound level of 55 decibels is identified as the outdoor level in residential areas compatible with the protection of public health and welfare. This day-night average sound level is based on all sounds at the particular location. Along these

same lines, it should be further noted that the Acoustical Society of America's proposed American National Standard S.3.23, recommends a yearly day-night average sound level of between 50 to 65 dB for residential, single-family building where extensive outdoor use is anticipated.

The "hard" scientific evidence refutes Plaintiffs' allegation that military operations create shock waves and excessive noise that interfere with health and welfare of residents of Vieques. The yearly daynight average sound level at Destino due to Navy aircraft is less than 44 dB, and due to gunfire, less than 41 dB.

It would be impossible for planning purposes to adopt a day-night average sound level limit lower than 55 dB., because the outdoor living on Vieques is already adapted to a day-night average sound level at times as high as 58 dB, which as previously stated is due mostly to biota, rain, thunder and the activities of the residents thereof. If an attempt were made to allow residential building only at places where the yearly day-night average sound level is less than 50 dB, no one would be allowed to build on Vieques. Whatever limit is adopted, it must be applied to the *combination of all sounds*, without discrimination as to source.

For the above reasons it is our opinion that Plaintiffs' claims under the Act lack a basis in fact as well as law.

A. *The Coastal Zone Management Act and related matters under the Endangered Species Act and the Marine Mammal Protection Act*

Plaintiffs allege that Defendant Navy's activities are inconsistent with the Coastal Zone Management Act of 1972, 16 U.S.C. § 1451 *et seq.* (hereinafter called the "CZMA" in this section) or with the Puerto Rico Coastal Management Plan (hereinafter called the "Plan") promulgated pursuant to CZMA.

The "CZMA" is an all-encompassing statement of Federal policy[68] vis-a-vis the Nation's coastal zone, which pro-

---

[68] See 16 U.S.C. §§ 1451,1452.

vides for various programs and grants to the States related to this policy. 16 U.S.C. 1454, 1455, 1456, 1456a, 1456b, 1456c, 1458, 1461. This statute is administered by the National Oceanic and Atmospheric Administration, an agency which is part of the United States Department of Commerce. Pursuant to 16 U.S.C. 1454–1455 said agency, on September 21, 1978, approved the Plan submitted by the Commonwealth of Puerto Rico.

The "CZMA" provides that:

> "Each Federal agency conducting or supporting activities directly affecting the *coastal zone* shall conduct or support those activities in a manner which is *to the maximum extent practicable* consistent with approved state management's programs." 16 U.S.C. 1456(c)(1). (Emphasis added).

As can readily be seen, the bone of this contention centers around Plaintiffs' allegations that Defendant Navys activities are inconsistent with the Commonwealth's Plan, while Defendant Navy claims that they have complied "to the maximum extent practicable." Defendant Navy also alleges that Plaintiffs' actions suffer from certain procedural defects.

There are various reasons why Plaintiffs' contentions are inappropriate, not least of which is that the "CZMA" and the Commonwealth's Plan are inapplicable to the Defendant Navy's lands in Vieques.

[4] The "CZMA", at 16 U.S.C. 1453(1) specifically excludes the lands in question:

> "The term 'coastal zone" means the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states, and includes islands, transitional and intertidal areas, salt marshes, wetlands, and beaches. The zone extends, in Great Lakes waters to the international boundary between the United States and Canada and, in other areas, seaward to the outer limit of the United States territorial sea. The zone extends inland from the shorelines only to the extent necessary to control

shorelands, the uses of which have a direct and significant impact on the coastal waters. *Excluded from the coastal zone are lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents.*" (Emphasis supplied).

The legislative history of this provision leaves little doubt as to this interpretation.

> "This section defines the various terms used throughout this bill. Of particular importance is the definition of "Coastal Zone." The coastal zone is meant to include the *non-Federal* coastal waters and the *non-Federal* land beneath the coastal waters, and the adjacent *non-Federal* shore lands including the waters therein and thereunder . . . . The zone also includes such transitional and intertidal (sic) as salt marshes, wetlands, and beaches. The outer limit of the zone is the outer limit of the territorial sea, beyond which the States have no clear authority to act. All federal agencies conducting or supporting activities in the coastal zone are required to administer their programs consistent with approved state management program. However, *such requirements do not* convey, release, or diminish any rights reserved or possessed by the Federal Government under the Submerged Lands Act or the Outer Continent Shelf Lands Act or *extended state authority to* land subject solely to the discretion of the Federal Government such as national parks, forests and wildlife refuges, Indian reservations and *defense establishments* . . ." (Emphasis added).

See Senate Report No. 92-753, 1972, U.S. code and AD.p. 4783. In the "Joint Explanatory Statement of the Committee of Conference", the Congress stated:

> ". . . The Conferees also adopted the Senate language in this section which made it clear that Federal lands are not included within a state's coastal zone . . . ."

See Conference Report No. 92-1544, 1972 U.S.Code & Ad. p. 4822.

Interestingly enough, the evidence on record shows that at a time when litigation was not contemplated, Plaintiff

Environmental Quality Board agreed with this conclusion. A cursory review of the approved Plan reveals that the Environmental Quality Board specifically *excluded* Federal lands in Vieques from the provisions of the Plan.[69]

We are confronted, however, with certain provisions of the regulations promoted by the National Oceanic and Atmospheric Administration pursuant to the "CZMA", which state:

> "Federal activities outside of the coastal zone (e.g., on excluded Federal lands . . . or landward of the coastal zone) are subject to Federal agency review to determine whether they significantly affect the coastal zone." 15 CFR 930.33(c).

We are somewhat at a loss to reconcile how Federal lands which are specifically excluded by the "CZMA" can nevertheless be subjected to review by administrative fiat. It would seem that the administrative inclusion of what has been legislatively excluded constitutes an *ultra vires* act. See, *Chrysler Corp.* v. *Brown*, U.S. (Slip Opinion April 19, 1979) p. 20. We need not decide this, however, as discussion of the merits of this controversy is also relevant to other pending issues.

Before entering into the merits of Plaintiffs' claims, however, we should consider the procedural objections raised by Defendant Navy to the effect that pursuant to the "CZMAs" mediation procedure (16 U.S.C. 1456(h)), the Court should defer to the "primary jurisdiction"[70] of the administrative agency charged with implementing the "CZMA." This point is not well taken. The mediation procedures contained in the "CZMA" are only mandatory on the Secretary of Interior[71] and not on either the Federal agen-

---

[69] See in *Exhibit CRB 400A* (footnote at page 185(a); see note on Map 9; page A-5; page B-20; Map 27; pages C-18, C-19).

[70] See gen.: Davis, *Administrative Law Treatise*, 19.01–19–06; *United States* v. *Western Pacific R.R.Co.*, 352 U.S. 59, 63–64 (1956); Far East *Conference* v. *United States*, 342 U.S. 570, 574 (1952).

[71] 16 U.S.C. 1456(h) reads as follows: "In case of serious disagreement between any Federal agency and a coastal state—(1) in the development or the initial implementation of a management program

cy or the coastal states, a fact made abundantly clear by the regulations enacted pursuant to said statute.[72]

The substantive charges implicit in Plaintiffs' allegations hereunder are without merit. Although the nature of Defendant Navy's activities have a tendency towards provoking dramatic conclusions, a dispassionate analysis of the scientific evidence leads us to the conclusion that the negative impact of the Defendant Navy's activities on the coastal zone of Vieques is negligible, and if the truth be said, the control of large area of Vieques probably constitutes a positive factor in its over all ecology. The very fact that there are in the Navy zones modest numbers of various marine species which are practically non-existent in the civilian sector of Vieques or in the main island of Puerto Rico, is an eloquent example of *res ipsa loquitur*.[73]

An analysis of the various components which make for a healthy coastal ecosystem reinforces this view point:

(1). *The coral reefs and related communities.*

Various studies were conducted related to alleged sedimentation of the reefs, particularly in the high impact areas of Bah´ida Salina del Sur and Bahía Icacos. These studies were conducted with a view to determining the extent and location of any deposition of terrigenous sediment[74] offshore, the location of areas of sediment damage to coral

---

under Section 1454 of this title; or (2) in the administration of a management program approved under section 1455 of this title; the Secretary, with the cooperation of the Executive Office of the President, shall seek to mediate the differences involved in such disagreement. The process of such mediation shall, with respect to any disagreement described in paragraph (2), include public hearings which shall be conducted in the local area concerned."

[72] CFR 930.116 Judicial review: "The availability of the mediation services in this subpart is not intended expressly or implicitly to limit the parties' use of alternate forums to resolve disputes. Specifically, judicial review where otherwise available by law may be sought by any party to a serious disagreement without first having exhausted the mediation process provided for in this subpart."

[73] Several marine turtles and manatees, of which we will later speak.

[74] Runoff.

reefs, and the source and causation of any excessive sedimentation on corals. This is important in that sedimentation not only causes turbidity in the water and therefore blocks off light essential to the various life processes, but also because sedimentation brings about stress to the coral, which diverts energy from its reef-building functions.

These studies show that the nature of sediments contained in the waters at the eastern end of Vieques[75] are similar to those of the Virgin Islands region, an area unaffected by Defendant Navy's activity and world-renowed for the clarity of its waters. Although there are some corals which have been damaged by sediment, mostly in a narrow zone on the protected or leeward edges of the reefs, the percentage of terrigenous sediment on these corals is very low, and runoff does not pose a threat of any measurable magnitude to any reef-building organism. The sediment damaged coral is the result of deposits caused by natural forces rather than Defendant navy's activities.

Comparative studies of the *Montastrea annularis*, an abundant coral[76] and a reef builder in Vieques and throughout the Caribbean, show that the effect of Defendant Navy's activities in Vieques has been negligible in terms of retarding coral growth rate. At present there is no irreparable damage to coral reefs in Vieques and what damage does exist can be repaired by the reefs' normal growth processes.

Although undoubtedly there are some indications that stray ordnance have caused some pocketing in a limited

---

[75] They reflect a high calcium carbonate sediment production rate typical to a small arid island. They are primarily biogenic aragonite with lesser amounts of calcite and a very small terrigenous fraction. Results of the percent insoluble analysis (used to determine percent terrigenous sediment) indicate a very low content of terrigenous sediment for all marine sediment samples, even in nearshore portions of shallow bays, except for those areas immediately adjacent to runoff sources: at the end of the "runaway' and adjacent to the inner gunnery target.

[76] Whose growth rate is highly sensitive to sedimentation and can easily be measured by X-Ray techniques.

area of the reefs of Bahía Salina del Sur and Bahía Icacos, the bulk of the damage observed in the reefs there and elsewhere is caused by the natural processes of bioerosion and wave action, which processes cause cracks, shearing and breakage in *Montastrea*. This type of coral damage is typical of any high energy (i.e., wave) area, such as eastern Vieques, and can easily be confused with damage caused by explosions.

A comparison of the Vieques reefs with those of the Virgin Islands is particularly apropos because of the almost identical geological, climatological, ecological and physical oceanographic parameters of these two areas.[77] Thus the analysis of Vieques reefs inside the area of naval activity vis-a-vis the control reefs in the Virgin Islands outside of any naval activity should establish whether any difference exists that can be attributed to naval presence on Vieques.

In the study conducted in the eastern Vieques range area (AIA/CAS/NGFS) approximately 10,000 sample points were taken representing a linear distance of over 10 kilometers. In the Virgin Islands 4,440 sample points were taken representing a linear distance of over 4.4 kilometers. The results of these two transact analysis reveal that the reefs in the eastern part of Vieques and those in the Virgin Islands[78] are almost identical in composition. The organic portions of these reefs show nearly identical percentages for all major reefs components. The amount of broken, diseased, and dead coral, and of coral rubble is very similar in both areas. This tends to demonstrate that both reef systems are subject to the same kinds and same amount of stresses. It is particularly significant when we consider

---

[77] The biophysical similarity of these areas is mainly governed by two parameters: (1) they rise from a relatively shallow, sandy sea floor, and (2) they are subject to considerable wave energy.

[78] Nine reefs were used in the Virgin Islands located in Dorothea Bays (St. Thomas), Little St. James, Johnson's Reef and Reef Bay (St. John's), and Togue Bay, Turner's Hole and Buck Island (St. Croix). Twelve reefs were used in Vieques commencing at Punta Este to Punta Icacos on the north coast and from Punta Este to Punta Matias on the south coast.

that a large percentage of the reefs studied in the Virgin Islands[79] is within the control of the Park Service of the Department of Interior and subject to stringent regulations as to its use, all of which reinforce our conclusion that the vast majority of coral rubble in both the Virgin Islands and Vieques is the result of natural bioerosion and wave action.[80]

The living biomass of both of these reef systems exhibit a very low abundance of plants and sponges.[81] This is again the result of the rather shallow and exposed surf crest type environment of these reefs. Sea grasses, microalgae and sponges do not usually flourish in a high energy environment.[82]

The quantitative assessment of 4,974 sample points of reef building corals in eastern Vieques reveals 14 points that show military impact. This is equivalent to 0.2% of the total reef and is representative of the damage attributable to the military to reefs in Vieques. This amount of damage is insignificant to the normal functioning of the Vieques reef ecosystem and clearly indicates that the impact of these activities on this system is negligible.

The coral reef fish communities in the Vieques range have also been compared with those in the Virgin Islands to determine differences in species, abundance, disease, parasitism and behavior.[83] The ten Vieques reefs studied

---

[79] Johnson's Reef and Reef Bay in St. John and Buck Island in St. Croix.

[80] As signified by the presence and dominance of the coral *Acropora palmata*, which is a known indicator of high energy regimes.

[81] 1–2%.

[82] This is also reflected in the composition of the plant and sponge populations, i.e., a large percentage of the plant and sponge population found in the transits are represented by the Corallinaceae, a family of red, coralline algae; sponges include a high number of *Anthosignella variaus*, forma *incrustans*. Both the Corallinaceae and the *Anthrosignella variaus* species are adapted to high energy environments.

[83] The Vieques study area was the eastern part of Vieques, the selection of reefs being those closest to the target range, the theory being

showed 105 species, as compared to the seven Virgin Islands reefs, which showed 109 species. The average number of species counted per hour is also very similar with 45 for Vieques and 43 for the Virgin Islands respectively, as well as the abundance of species, with both areas having 19 species with abundance scores of over 50%.[84]

The sublethal effects of military ordnance were also studied. In over 50 hours of diving in Vieques, only one fish was observed with an open wound, and that was of undetermined origin. Disease was not seen in either Vieques or the Virgin Islands.[85]

No abnormal behavior was observed in either study area. In fact courtship and spawning of the Blue-Headed Wrasse was seen in all but two reefs in both Vieques and the Virgin Islands, a factor which scientists consider demonstrative of a healthy and undisturbed fish population.

The results of this study are of relevance to commercial fishing in Vieques in that 40% of the species recorded are also caught commercially. Evidence that the numbers of the fish in the range have not been reduced by military activity is that the catch-per-unit-effort has remained constant from 1968 through 1978, in contrast with the south central area off Vieques, which is in the civilian sector, where the catch-per-unit-effort is half its level 10 years ago, thus indicating over-fishing by the fishermen rather than a negative impact from Naval activities.[86]

---

that these would show the greatest biological impact by Naval activities. Ten reefs were studied in Vieques and seven in the Virgin Islands.

[84] Because many of the species occur in large schools, it is impossible to individually count their number. It is thus, standard procedure to use an index of abundance score, in which the quantity of a species is placed into one of five numerical categories and an estimate of their numbers is made within a numerical range.

[85] A large external isopod parasite was counted on the Yellow-edged chromia, a very abundant fish in both study areas, showed almost identical average sightings per reef, 1.6 for Vieques and 1.5 for the Virgin Islands.

[86] This factor together with others that were brought out during the trial, such as the continued poaching by fishermen of turtles and their

We thus conclude that the health of the coral reef fish in Vieques is equivalent to those of the Virgin Islands and reflects a substantially intact coral reef ecosystem.

(2) *The sea-grass communities*

The sea grass communities located in Vieques at Bahía Icacos, Bahía Salinas, Bahía Salinas del Sur and Mosquito Bay were studied and compared to those of Tague Bay (St. Croix). Two grass species were studied: *Thalassia testudinum* and *Syringodium filiforne*. Average sea grass productivity at Vieques is 3.1 gm/m/²/day as compared to 2.8gm/m²/day at St. Croix, thus showing slightly higher values in Vieques.[87] Furthermore, a comparison of the biomass weight of these two areas implies that the standing amounts of seagrass in both places is approximately equal.

The sea grass studies thus show that Vieques has moderately productive seagrass beds, that are healthy, and typical of sea grass beds throughout the Caribbean.

A sampling of grassbeds fish yielded 25 species in Vieques and 35 species in St. Croix. The density of fish in St. Croix was 57.9 fish/sample compared to 21.5 fish/sample on Vieques. Species diversity on St. Croix was 3.107 as against 2.787 for all samples.

There is no doubt but that the impact of ordnance on grass beds creates craters and removes sediment and rhizomes at the point of impact. This damage is limited to the immediate area of impact. No craters were observed larger than about six feet in diameter and these are principally limited to the waters in the immediate vicinity of Bahía Icacos, Bahía Salinas, and Bahía Salinas del Sur in the AIA/CAS/NGFS zone. None appear to be enlarging or becoming blowouts.

---

eggs, causes us to conclude that the Vieques fishermen are not as conservation-minded as they would have us believe.

[87] The average value for Vieques seagrass productivity of 3.1 gm/m²/day compares favorably with world averages of daily productivity of cultivated wheat (2.5), corn (3.0) and rice (3.6).

Blowouts, which are migrating holes in grassbeds that erode at one edge while recovering at another edge, occur on the northwest end of Vieques. Those blowouts were caused mainly during the construction of a fresh water pipe from Puerto Rico to Vieques by Commonwealth employees or agents.

Grassbeds can recover from physical disturbance, and most of those on Vieques show signs of recovery. Nearly all creaters show growth of green algea such as *Penicillus* and *Halimeda*, which are known early colonizers in the Caribbean. At least two craters north of Punta Gato show colonization by *Thalassia*, the final state in recovery.

A comparison between aerial photographs of Bah:aclia Icacos, Bahía Salinas and Bahía Salinas del Sur taken in 1936–37, with others taken in 1978, show an increase rather than decreases in the total seagrass areas. In 1937 Bahía Salinas del Sur, an area of approximately 143.17 hectares (Ha), contained about 35.7 Ha of seagrass of which 15.3 Ha were dense seagrass. In 1978 this area has 85 Ha of seagrass of which 63.5 Ha is dense seagrass. In Bahía Icacos and Salinas, a total area of about 33.8 Ha, there was an increase in seagrasses of from 7.5 to 17.4 Ha during this same period.

In our opinion the da.nage to seagrass from the activities of Defendant Navy is neither substantial, permanent nor irreversible. As a matter of fact, even if all the seagrass in the eastern end of Vieques were damaged or removed, this would constitute but a relatively small portion of the seagrass productivity of the entire island, as the largest seagrass beds are located not in the AIA/CAS/NGFS zones but rather in the western portions of Vieques.

Studies were also conducted of the benthic faunal communities associated with seagrasses around Vieques. The object of these studies was to quantify benthic (in fauna), epibenthic (live on sediment) and cryptic (live on and among the blades) fauna which provide the main link between primary production of the area and higher trophic level consumers, many of which are valuable sport and com-

mercial species, and to assess the condition of these communities.[88]

The fauna of the samples was dominated numerically by small polychaetous annelids, with no sample dominated by any one species or even one family of organisims. No pattern was discernible that could be associated to Naval activity. For example, a station within a "very disturbed area" yielded a high abundance of organisms and had an almost exact analog in a station which had similar species and abundance but was more than 1 kilometer to the west, outside the impact area. The station with the highest seagrass biomass, off Punta Gato, had the fewest animals. We thus must conclude that benthic abundance cannot be positively correlated to seagrass standing crop biomass.

Furthermore, any implication that military and other debris in a seagrass meadow is always detrimental is erroneous.[89] A change in the vertical relief in a seagrass bed or sand bottom acts as an attractant to important organism such as spiny lobsters. Natural phenomena, such as blowouts, also provide this vertical relief and in Mosquito Bay serve as a surrogate reef, attracting concentrations of fishes and crustaceans usually found on patch reefs which are not present in the Bay.

(3) *Mangrove wetlands*

Mangroves are an important segment of the coastal ecosystem. See: *Commonwealth of Puerto Rico v. SS ZOE COLOCOTRONI*, supra. They are valuable as habitat for marine and estuarial vertebrates and invertebrates, are an important segment of the marine detrital food chain, and act as shoreline stabilizers.

As previously aluded to, there are several areas of mangrove in Vieques,[90] most of which are within Defendant

---

[88] Six sampling stations were within the impact zone in Bahia Salinas and Bahia Salinas del Sur, and five were in non-impact stations at Ensenada Honda, Puerto Negro and Mosquito Bay.

[89] Cf. 16 U.S.C. 1220 *et seq.*

[90] All four varieties of mangrove common in the Caribbean are found in Vieques: red mangrove (*Rhizophora mangle*), white mangrove

Navy's properties. Commencing from west to east the important mangrove forests are the Punta Arenas-Laguna Kiani (199.49 "cuerdas")[91] and Laguna Playa Grande (57.68 cdas.) forests in the NAF, and the Puerto Mosquito (102.12 cdas.), Puerto Ferro (48.18 cdas.), Bahía Tapón (20.36 cdas.), Bahí Chiva (34.27 cdas), Bahía Yanuel (27.48 cdas.) and Ensenada Honda (86.18 cdas.) forests along the southern coast of the GMA. There are no mangrove stands of any significance or importance in either the SIA or AIA/CAS/NGPS zones.

Two of the above mangrove areas, Punta Arenas-Laguna Kiani and Puerto Mosquito, are under stress although the cause of the stress cannot be attributed to Defendant Navy's activities.

In the Punta Arena-Laguna Kiani mangrove complex there is a large area of dead mangrove in the Laguna Boca Quebrada area. Plaintiffs claim that the cause of this mortality is the closing of an alleged access to the sea with a consequent rise in the salinity of the entrapped waters, a factor which is highly detrimental to mangrove forests. However, pre-1940 aerial photographs and maps of this area show the existence of a continuous roadway between that mangrove forest and the sea and thus clearly establish that the present day road existed before Defendant Navy's arrival in Vieques. Although there is a dry stream bed to the south of Punta Boca Quebrada which is crossed by a tramway construction, this stream bed, as appears from a map of the area,[92] is not connected to the mangrove swamp but rather serves the watershed to the north of Monte Pirata. More recent maps show a channel-like connection between Laguna Boca Quebrada and the sea, but no evidence was presented as to any activity of Defendant Navy which could support a finding that Defendant Navy has caused its blockage. If such a channel did in fact exist, it

---

(*Laguncundora racemosa*), black mangrove (*Avicennia nitica*), and button mangrove (*Conocarpus erecta*).

[91] A "cuerda" is the equivalent of .97 acres.

[92] As well as from the helicopter inspection of the area.

would be as reasonable to pressume that it has filled from natural causes. We might add that it would be a simple operation to reopen such a channel because of the proximity of Laguna Boca Quebrada to the sea.

The second mangrove area of immediate concern is that on the western side of Puerto Mosquito, behind the public beach at Ensenada Sombe. This mangrove, although bordering in part on the Naval reservation (GMA), is actually in the civilian sector. The cause of the stress to this forest is again the hypersalinity of the soil, this time brought about by the blockage or diversion of the fresh water runoff and ground water. This has been caused by the re-routing of the civilian road between Esperanza and Isabel Segunda and by the excessive pumping of well in the area. Neither of these factors can be attributed to Defendant Navy.

In our opinion the activities of Defendant Navy have a negligible impact on the mangrove ecosystem of Vieques.

(4) *Bioluminescent bays*

There is no credible evidence on the record to support any finding that any activity of Defendant Navy has in any way affected the bioluminescent bays or the organisms that thrive therein.

(5) *Beaches*

There are numerous beaches throughout the Defendant Navy's property in Vieques. With the exception of those in the confines of the AIA/CAS/NGFS zones the public is allowed permission to use them when maneuvers are not in progress. Green Beach (Punta Arenas), as previously stated, is in fact used almost exclusively for recreation purposes by both service personnel and civilians.

As indicated, the bulk of the amphibious operations take place at Blue Beach on the South coast. These operations are not on a continuous basis but rather take place two or three times a year. There is no indication that the use of this beach for these purposes causes any significant negative impact on the beach or its related surroundings.

The beaches within the AIA/CAS/NGFS zone, namely those in Bahía Salina del Sur, Bahía Icacos and Bahía Sali-

nas frequently receive direct ordnance impact. This may result in debris being strewn throughout as well as occasional unexploded rounds or bombs. The latter are periodically cleared or detonated in place by demolition crews of Defendant Navy. Quite obviously under its present use, these particular beaches would be inappropriate for use by the public. But in our opinion, the evidence is at best inconclusive that these activities have a *substantial* negative ecological impact on these beaches. In any event we conclude as a matter of law that because of the limited area in question and because of the intrinsic nature of the activity being conducted, Defendant Navy has "to the maximum extent practicable" conducted activities in compliance with the Act.

(6) *Wildlife*

Generally speaking, and leaving aside fish species already described, the wildlife in Vieques' coastal zone consists of various aquatic, mangrove, and sea bird species, various kinds of turtles and lizards, and the manatee.

Birds, however, are the dominant form of wildlife in Vieques, and the coastal zone is no exception.[93] The exist-

---

[93] The following is a summary of the bird species that can be found in the various areas of the Vieques coastal zone, keeping in mind that the abundance of number and of species to be found at any given time is subject to seasonal migrating variation:

(1) Mangrove forests: Yellow warbler (*Dendroica petechia*), Banaquit (*Coereba flaveola*), Greater Antillean Grackle (*Quiscalus niger*), Black-whiskered Vireo (*Vireo* altiloquis), Grey Kingbird (*Tyrannus dominicensis*) Green-Throated Carib (*Sericotes holosericeus*), Zenaida Dove (*Zenaida aurita*), White-crowned Pigeon (*Columba leucocephala*) Mangrove Cuckoo (*Cocyzus minor*), Black-crowned Night Heron (*Nyctanassa violacea*), Great Blue Heron (*Ardea herodias*), Green Heron (*Butorides virescens*), Little Blue Heron (*Florida caerulea*), Cattle Egret (*Bubulcus ibis*), Great Egret (*Egretta alba*) Snowy Egret (*Egretta thula*).

(2) Mangrove lagoons: Common Gallinule (*Gallinula chloroopus*), Green Heron (supra), Clapper Rail (*Rallus longirostris*), Little Blue Heron (supra), White checked Pintal (*Anas bahamensis*), Yellow-crowned Night Heron (supra), Tricolored Heron (*hydranassa tricolor*) Snowy Egret (supra), Pied-Billed Grebe (*Podi-lymbus podiceps*)

ence, relative abundance, and variety of bird life in Vieques, and in particular within Defendant Navy's properties, clearly negate Plaintiffs' contentions to the effect that the activities conducted therein are unfavorably affecting said wildlife. We do not credit evidence presented to the contrary.

a. *The Endangered Species Act*

As previously stated, various species of Vieques' wildlife are listed as threatened or endangered pursuant to the En-

---

Brown Pelican (*Pelecanus occidentalis occidentalis*)), Magnificient Frigatebird (*Fregata magnificens*) Great Blue Heron (*supra*), Great Egret (*supra*), Black crowned Night Heron (supra), Least Bittern (*Ixobrychus exilis*), Bluewing teal (*Anas discors*), Ruddy Duck (*Oxyura jamaicensis*), *Osprey (Pandionhaliaetus*) Caribbean Coot (*Fulica caribaca*), Laughing Gull (*Larus atricilla*) and Least Tern (*Sterna albifrons*).

(3) Mangrove mudflats and saltflats: Blacknecked Stilt (*Himantopus mexicanus*), Thick-billed Plover (*Charadrius wilsonia*), Semipalmated Sandpiper (*Charadrius semipalmatus*), Ruddy Turnstone (*Arenaria interpres*), Shortbilled Dowitcher (*Limnodromus griseus*), Black-bellied Plower (*Pluviales squatacola*), Greater Yellow Legs (*Tringa* melancolucca), Semipalmated Plover (*Charadrius semipalmatus*), Spotted Sandpiper (*Actitis mocularia*), Lesser Yellowlegs (*Tringa flavipes*), and the Least Tern (*supra*).

(4) Beaches: Thick-billed Plover (*supra*), Royal Tern (*Sterna maximus*), and Yellow-crowned Night Heron (supra).

(5) Offshore cays and rocky coastline with adjacent cliffs: Caribbean Martin (*Progne dominicensis*), Yellow Warbler (*Dendroica petechia*), Ground Dove (*Columbina* passerina), Green-throated Carib (supra), Grey Kingbird (*supra*), Caribbean Elaenia (*Elaenia martinica*), Zenaida Dove (*supra*), White-Tailed Tropic-bird (*Phaetheon lepturus*), Brown Pelican (*supra*), Brown Booby (*Sula leucogaster*), Magnificent Frigatebird (*supra*), Yellow-crowned Night Heron (supra), American Oystercatcher (*Haematopus ostralegus*), Laughing Gull (*supra*), Roseate Tern (*Sterna* dougallii), Bridled Tern (*Sterna anaethetus*) and Pearly-eyed Thrasher (*Margarops fuscatus*).

(6) Oceans

(a) Onshore waters and bays: Brown Pelican (*supra*), Magnificent Frigatebird (*supra*), Royal Tern (*supra*), Laughing Gull (*supra*), *Brown Booby (supra*), Osprey (*supra*), and Least Tern (*supra*).

(b) Offshore waters: White-tailed Tropic-bird (*supra*), Brown Booby (*supra*), Roseate Tern (*supra*), Sooty Tern (*Sterna Fuscata*) and Bridled Tern (*supra*).

dangered Species Act, 16 U.S.C. §1531 *et seq.*[94] and these should be discussed herein with some particularity. The endangered species include the Brown Pelican, the Hawksbill Turtle, the Leatherback Turtle and the West Indian Manatee. See 50 CFR §17.11. The threatened species include the Green Turtle and the Loggerhead Turtle. See 43 Fed. Reg. 32800.

It is a declared purpose of this statute "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . [*and*] that all Federal departments and agencies . . . seek to conserve endangered species and threatened species." 16 U.S.C. §1531 (b) and (c). Generally speaking the "taking" by any person of any endangered species within the United States or its territorial sea is prohibited. 16 U.S.C. 1538. This statute defines "taking" as including to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. 1532(19). The law encompasses within the term "person", any "officer, employee, agent, department, or instrumentality of the Federal Government." 16 U.S.C. 1532(13). All Federal departments and agencies are required to carry out programs for the conservation of threatened and endangered species, and to insure that actions "authorized, funded, or carried out by them do not jeopardize the continued existance of such endangered. . . and threatened species or result in the destruction or modification of habitat of such species which is deter-

---

[94] 16 U.S.C. 1532: "(6) The term 'endangered species' means any species which is in danger of extinction throughout all or a significant portion of its range . . . . . "(20) The term 'threatened species' means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."

The Statute provides for a procedure whereby the Secretary of the Interior, by regulation, establishes what species are threatened and/or endangered, 16 U.S.C. 1533.

There is no flora from any part of Puerto Rico, including the Island of Vieques, which is currently listed as endangered or threatened.

mined by the Secretary, after consultation as appropriate with the affected States, to be critical." 16 U.S.C. §1536(a).

It is an undisputed fact that all of the mentioned threatened or endangered species can be found in Vieques or its surrounding seas.

The substance of Plaintiffs' allegations is that Defendant Navy's activities constitute prohibited "takings." It is further alleged that these actions are contrary to law in that they fail to ensure that the species' continued existence is not jeopardized or that habitat deemed critical is not destroyed or adversely modified.

It is best to discuss these species separately.

i. *The Brown Pelican*

Brown Pelicans are colonial nesters, who seem to prefer to construct their nests on perches in small coastal islands. In Vieques, they have established a nesting colony on Cayo Conejo (also referred to at times as No-Name Island), a two acre island located just off-shore from Bahía Salinas del Sur on the AIA/CAS/NGFS zones.

Plaintiffs claim that the Cayo Conejo rookery is one of only two in Puerto Rico, the other one being in a small island off La Parguera, in the South coast. They claim that Defendant Navy's activities disturb the Brown Pelican's reproductive activities because they prefer quiet, secluded surroundings to carry out these functions.

Although these are plausible arguments, we are immediately confronted with various factors which militate against our adoption of the same. The most obvious one is the very fact that the pelicans have chosen Cayo Conejo as a nesting site. This rookery has been known to exist since at least 1971. If pelicans are as susceptible to military activity as is alleged one wonders why they established a nesting colony in such close proximity to Vieques' most active military zone. In fact, the "Puerto Rico Coastal Management Program and Final Environmental Impact Statement" (referred to in Section IV H above, as the "Plan", prepared by the Department of Natural Resources of the Commonwealth), lists the mudflats in San Juan Bay, a commercial harbor with considerable traffic and in whose midst is located an

important local airport, "as [A] nesting area[s] by the Brown Pelican (supra, p. C–1).[95] More in point however, there is no evidence of a decline in the total population of the Vieques pelicans, a factor which would seem to bear a direct relationship to the breeding rate of the resident birds, and thus on whether the Cayo Conejo colony is being disturbed by Defendant Navy's activities.

There is more specific data to substantiate these conclusions. Studies conducted of the Cayo Conejo group showed a clutch size of 2.58 eggs per nest, precisely the same clutch size found in Florida colonies during an eight year study. This tends to demonstrate that the Vieques colony has not suffered during the nesting season. The birds observed in Vieques had an ageclass distribution with a high percentage of "birds of the year", and a resonable number of subadults, which also indicates a healthy population with a stable ageclass distribution. Direct observation of the Cayo Conejo group during both periods of military activity and otherwise, showed no noticeable reaction by pelicans during military operations. In fact pelicans were observed engaging in low-intensity courtship behavior during operations, even though adult birds are most susceptible to any form of disturbance during courtship activity. This is supportive of scientific opinion that birds, including Brown Pelicans, habituate themselves to noise and to the presence of airplanes.

From personal observation by the Court, there is no evidence of recent military activity taking place on Cayo Conejo. The only evidence that could be observed of any military activity on this island were the remains of some craters, completely covered over by grass, and some rusted metal fragments. In fact, the major disturbance to this

---

[95] The large number of Brown Pelicans that can be seen throughout Puerto Rico would seem to put in question their "endangered" status in fact if not in law (this can not of course be legally questioned except through the administrative procedures encompassed in 16 U.S.C. 1533). In San Juan Harbor for example, many could be seen, even within sight of undersigned Judge while sitting on the bench presiding in this case.

nesting colony is brought about by visits of fishermen who go onto the cay to collect snails. By restricting the presence of humans in this area, Defendant Navy has *de facto* provided a refuge for the pelicans (and other wildlife).

Although there is no designated critical habitat in Vieques for Brown Pelicans, Defendant Navy has proposed a cooperative agreement with the U.S. Fish and Wildlife Service establishing Cayo Conejo as a managed resource for Brown Pelicans. Under this agreement overflights are restricted to altitudes above 500 feet and no personnel will be permitted to visit the cay except on ornithological or operational safety matters. This altitude restriction is presently contained in Defendant Navy's Ranger User's Manual.

ii. *The Sea Turtles*

Here again we are confronted with the fact that the sightings of the turtles and of their nests are almost exclusively within Defendant navy's properties or in the waters adjacent thereto, and again in close proximately to or within the AIA/CAS/NGFS zone. Plaintiffs contend that this dictates the automatic curtailment of Defendant Navy's activities, without considering that it is perhaps this presence that accounts for the existence of the species there.

In any event, we must take into account that Vieques is not considered a major turtle site in terms of the range of the species here in question. This is a fact which has been officially recognized by the failure to designate as critical habitat any area in Vieques for any of these species.

The evidence shows that the population of green turtles on Vieques does not represent a significant proportion of the total number of these species. Again in terms of the total numbers of the species, the number of loggerhead turtles in the Caribbean is quite small, and those that can be found in Vieques insignificant. Even the presence of the leatherback and hawksbill turtles in Vieques is not of importance in terms of relative numbers when compared to the various other Caribbean sites where it is found, notwithstanding that these two species are the most abundant of the sea turtles to be found in Vieques.

Furthermore, no credible evidence was presented to show that any activity of Defendant Navy is affecting the sea turtles in Vieques in any significant manner.[96] The record shows that the greatest threat to these species in Vieques, as throughout the Caribbean, has been the unrestricted fishing that has taken place.[97] There is evidence that this fishing, although presently illegal under the Endangered Species Act, is still taking place around Vieques, together with the poaching of sea turtle eggs and nesting adults. Defendant Navy's presence on Vieques, together with the restrictive nature of its activities, has had some measure of benefit to the turtle population by precluding some of the illegal fishing and egg poaching.

b. *The Manatee and the Marine Mammal Protection Act*

The Manatee (*Trichechus manatus)*, a large herbivorous marine mammal of the order *Sirenia*, is protected by the provisions of both the Endangered Species Act, supra, and the Marine Mammal Preotection Act, 16 U.S.C. §1362(5).[98]

---

[96] Although it is undoubtedly true that if a heavy tracked vehicle were to pass over a turtle nest the nest would be destroyed, it is clear speculation to say that this is taking place. The areas used by the turtles for nesting sites are located in the northeastern extremities of Vieques in beaches which are mostly isolated and not used for landings.

Copious testimony was also presented dealing with a theory to the effect that the light from parachute flares attracts the hatchlings inland, thus causing their destruction. We consider this such an absurd argument when one considers the many other sources of light in Vieques, including the moon, that it bears no further comment.

[97] The records of catches of a Vieques fisherman were presented at the trial. These showed a steady decline in the catches, as the adult reproducing stock was progressively decimated. The removal of adult seaturtles from the population is much more serious than the removal or destruction of sea turtle eggs. The numbers of hatchlings that attain adulthood is very low, due to natural causes such as predation by sea gulls. It is thus imperative that there be large number of egges laid to overcome this high natural mortality rate. The killing of an adult has the obvious result of reducing to zero the reproduction rate of that adult.

[98] "The term 'marine mammal' means any mammal which (A) is morphologically adapted to the marine environment (including . . . members of the orders Sirenia . . .)."

This later statute also prohibits the "taking" of the manatee by any person in waters or on lands under the jurisdiction of the United States (16 U.S.C. §1372(2)(A)). The definitions of "taking" and "person" in this law are similar to those contained in the Endangered Species Act. 16 U.S.C. §1362(10), (13).

The evidence presented demonstrates that the manatee is found in larger numbers and concentration in Vieques than in any other area of Puerto Rico except perhaps the Naval Reservation at Roosevelt Roads, across Vieques Sound. We do not deem it coincidental that both of these areas are under the control of Defendant Navy.

The Vieques group, which is concentrated almost exclusively in the sea grass beds around Punta Arenas (in the northwest), consists of between 13 to 25 manatees and includes a significantly large proportion of calves. It remains questionable whether the manatee population of Vieques is totally discreet from that of Roosevelt Roads, particularly since there are no year round fresh water sources on Vieques, which seems to be a periodic requirement for manatees.[99] However, the northwestern sector of Vieques, in addition to containing large areas of sea grass, has sediment of sufficient penetrability as to allow the manatee to easily root for the base of the grass, the preferred manner of feeding of manatee.

As previously indicated, the area of Vieques preferred by the manatee is an area almost totally devoid of any military activity. Again, although no area of Puerto Rico has been designated as critical habitat, we can find no activity of Defendant Navy which can be said to be affecting in any adverse way the manatee or its habitat.

The facts which we have found proven establish as a matter of law that there has been no "taking" of any of the above-mentioned endangered or threatened species under either the Endangered Species Act or, as applicable, the

---

[99]There are various fresh water streams in an around the Roosevelt Roads area.

Marine Mammal Protection Act.[100] Furthermore, as previously indicated, no "critical habitat" designation has been effectuated as to any of these species pursuant to the procedures established by the Endangered Species Act, 16 U.S.C. 1533. Lastly, the actions filed under both the Endangered Species Act and the Marine Mammal Protection Act suffer from serious procedural defects: as to the first statute, Plaintiffs have failed to comply with the 60-day notice requirement of 16 U.S.C. 1540(g)(2),[101] which we deem to bar this citizen suit, (Cf, *Loveladies Property Owners Assn. v. Raab*, supra, at page 281); and as to the second, said Act not only fails to establish "citizen suits" for its enforcement but rather specifically limits such powers to the Secretary,[102] and thus Plaintiffs lack standing herein to enforce this Act.[103]

The sum total of the matter discussed under Section IV H above of this decision is thus that Plaintiffs have failed to state claims under either the Coastal Zone Management Act, the Endangered Species Act or the Marine Mammal Protection Act.

---

[100] 50 C.F.R. § 17.3 defines "harnass" and "harm" to mean, respectively:

"An intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include but are not limited to, breeding, feeding or sheltering."

"An act or omission which actually injures or kills wildlife, including acts which significantly disrupt essential behavioral pattern, which include, but are not limited to, breeding, feeding, or sheltering significant environmental modification or degradation which has such effects is included within the meaning of harm."

[101] Which reads in its pertinent part:

"(A) No action may be commenced under subparagraph (1) (A(of this Section [citizen suits] (i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation. . ."

[102] 16 U.S.C. 1377. The Secretary can delegate enforcement to any State. 16 U.S.C. 1379(c). No such delegation has taken place here.

[103] See discussion Section IV E above.

1. *The National Historic Preservation Act and Executive Order 11593.*

Plaintiffs allege violations by Defendant Navy of Executive Order 11593 ("Protection and Enhancement of the Cultural Environment", May 13, 1971, 36 F.R. 8921, noted at 16 U.S.C. §470) and of Section 106 of the National Historic Preservation Act (16 U.S.C. §470 f), referred to as the "Act" in this Section.

Section 2 of the Executive Order states in part, that federal agencies shall:

> "(a) no later than July 1, 1973, with the advice of the Secretary of the Interior and in cooperation with the liaison officer for historic preservation for the State or Territory involved, *locate, inventory, and nominate* to the Secretary of the Interior all sites, buildings, districts and objects under their jurisdiction or control *that appear to qualify for listing on the National Register of Historic Places.*
>
> (b) *exercise caution during the interim period* until inventories and evaluations required by subsection (a) are completed to assure that any federally owned property that might qualify for nomination is not inadvertently transferred, sold, demolished or substantially altered. The agency head shall *refer any questionable actions* to the Secretary of the Interior for an opinion respecting the property's eligibility for inclusion on the National Register of Historic Places. The Secretary shall consult with the liaison officer for historic preservation for the State or territory involved in arriving at his opinion. Where, after a reasonable period in which to review and evaluate the property, the Secretary determines that the property is likely to meet the criteria prescribed for listing on the National Register of Historic Places, the Federal agency head shall reconsider the proposal in light of national environmental and preservation policy. Where, after such reconsideration, the Federal agency head proposes to transfer, sell, demolish or substantially alter the property he shall not act with respect to property until the Advisory Council on Historic Preservation shall have been provided an opportunity to comment on the proposal." (Emphasis supplied).

Section 106 of the National Historic Preservation Act (16 U.S.C. §470 f) states that:

> "The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object *that is included in or eligible for inclusion*[104] *in the National Register*. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Sections 470i to 470 n of this title a resonable opportunity to comment with regard to such undertaking." (Emphasis added).

The National Register referred to is a listing maintained by the Secretary of the Interior ". . . of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, and culture . . ." 16 U.S.C. 470(a)(1). The Commonwealth of Puerto Rico is eligible to have listings in the National Register (16 U.S.C. 470a(b)(1)). There are three locations in Vieques that are enumerated therein: the fort and light house at Isabel Segunda, and Frenchman's House at Esperanza. See 44 Fed. Reg. 7416, 7561 (Feb. 6, 1979).

Criteria for inclusion in the National Register is established in 36 C.F.R. 800.10(a):

> " 'National Register Criteria' means the following criteria established by the Secretary of the Interior for use in evaluating and determining the eligibility of properties for listing in the National Register: The quality of significance in American history, architecture, archeology, and culture is present in districts, sites, buildings, structures, and objects of State and local importance that possess integrity of location, de-

---

[104]The phrase "or eligible for inclusion in" was added to the Act by Pub. L. 94–422 in 1976.

sign, setting, materials, workmanship, feeling and association and:

(1) That are associated with events that have made a significant contribution to the broad patterns of our history, or

(2) That are associated with the lives of persons significant in our past: or

(3) That embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual, distinction; or (4) That have yielded, or may be likely to yield, information important in prehistory or history."

There is little doubt in our mind but that Defendant Navy did not at any time prior to the commencement of the present actions locate, inventory and/or nominate any site or otherwise that appear to qualify for listing on the National Register, as required by Section 2(a) of the Executive Order.

After these actions were filed, however, Defendant Navy has conducted an extensive survey to such effects.[105]

---

[105] The methodology of this survey began with a literature search to provide an overview of the cultural resources on Vieques for historic and archeological sites. Material found at the Institute of Puerto Rican Culture and at the University of Puerto Rico was reviewed, and various persons were contacted in Vieques to supplement the documentary search. Thereafter a predictive base was prepared from which locations could be identified for purposes of evaluation.

The field work was performed in two phases. The first phase was the survey of the target area east of Cerro Matías, which took thirteen and a half days. The second phase involved a sampling program for the remainder of the island and required one hundred and eighteen man days of effort. The survey methods allowed a survey of 55% of the NAF and 34% of the eastern area.

Because of the size of the area on Vieques, it would take at least two years and hundreds of thousands of dollars to conduct a 100% survey. No other areas of a comparable size to Vieques has been surveyed 100%, nor do we believe this to be the intention or a requirement of the law.

In our opinion the sampling method devised by Defendant Navy pro-

Prior to this survey twenty nine archeological sites were known to exist in Vieques, of which all but two were in the civilian sector. The survey found an additional forty-five new sites, forty of which are on military property. The survey also located seventeen historical sites and structures, thirteen of which are on Naval lands.

There are at present no significant archeological or historical sites in the AIA/CAS/NGFS zones. Any that may have existed there have in all probability been destroyed.[106]

For sites which are located west of Cerro Matías, however, are not in any immediate danger of harm or destruction by virtue of Defendant Navy's activities.

Although Defendant Navy admits that some of the newly discovered sites may be eligible for listing in the National

---

vides an unbiased sample of the archeological sites on the entire island of Vieques. This method divided Vieques into 665 sectors each of which measured 500 by 500 meters. A group of sectors (10%) were picked at random from a random numbers chart. Another 10% of the total of 665 sectors was chosen by picking the first number at random and then selecting all the other sectors at constant intervals. The third group was picked based on the knowledge of experts as to where archeological and historic sites should be found.

On the field, the squares which were to be surveyed were walked at intervals of 100 meters from East to West, making several passes, and then from North to South at the same intervals. Four hundred twenty one squares, or 63.2% of the total squares on the island were reviewed in one manner or another. Defendant Navy's archeological survey teams actually walked 1.62% of the total surface of the island.

[106] In all fairness we should state that this could very well have happened prior to 1971. See also footnote 97. It is in any event an academic point. The fact is that this area is at present archeologically and historically sterile. We might add however, that we have some doubts as to whether this area was ever a likely place for such findings. The evidence tends to indicate that in historic times there was little activity there, and in prehistory, it was most probably a transit zone rather than one of settlement.

Some support for this theory is found in comparing St. Croix and Vieques, both of which are archeologically akin because of the similar nature of their soil types, their cultural sequences, and their geographic proximity. In St. Croix, as in Vieques, no archeological sites have been found on its easternmost end, an area which is comparable to that East of Cerro Matías.

Register no action has been taken to nominate them to the Secretary of the Interior or to seek his opinion respecting said eligibility. Thus Defendant navy is in violation of Section 2(a) and (b) of Executive Order 11593. This order was issued pursuant to statutory authority[107] and has the force of law. CF. *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629, 632 (C.A., 5, 1967), cert. den. 389 U.S. 977 (1967); *Association of Women in Science v. Califano*, 566 F.2d 339, 344 (C.A. D.C. 1977). Violation of this Order may be privately enforced. *Aluli v. Brown*, 437 F.Supp. 602, 608–609 [10 ERC 1765] (D.C. Hawaii, 1977) rev. in part, [13 ERC 1382] (C.A. 9, July 9, 1979) (slip opinion); *Save the Courthouse Committee v. Lynn*, 408 F. Supp. [8 ERC 1209] 1323, 1331 (S.D.N.Y., 1975).

K. Claims under the Fifth Amendments and Related Matters

A. Alleged violations of agreements, Presidential Orders and Congressional Directives.

Plaintiffs claim that Defendant Navy has violated an agreement, and commitments with the Commonwealth of Puerto Rico, not to transfer to Vieques operations formerly conducted by Defendant Navy in the Island of Culebra. It is also alleged that Defendant Navy in transfering these activities, violated Presidential and Secretary of Defense orders not to effectuate a transfer from Culebra to an alternate site in Puerto Rico, without prior Commonwealth approval. Lastly, Plaintiffs contend that Congress, in enacting various Military Construction Authorization Acts[108] intended "to exercise direct legislative supervision of the decision-making of the Department of Defense" with respect to the alleged Culebra transfer, by requiring the Secretary of Defense to study the problem, negotiate and obtain an agreement from the Commonwealth Government

[107] The National Environmental Policy Act of 1969 (42 U.S.C. § 4321 *et seq.*), the National Historic Preservation Act of 1966 (16 U.S.C. § 470 *et seq.*), the Historic Sites Act of 1935 (16 U.S.C. § 461 *et seq.*) and the Antiquities Act of 1906 (16 U.S.C. § 431 *et seq.*).

[108] The Military Construction Authorization Act of 1971 (PL. 91–511), 1972 (PL. 92–145) and 1974 (PL. 93–166).

prior to any transfer within Puerto Rico, and report and recommend to Congress on the outcome of said matters.

The roots to these allegations are traceable to a controversy that commenced in this Court in the case of *Feliciano v. United states*, 297 F. Supp. 1356 (D.P.R., 1969), aff'd 422 F.2d 943 (C.A. 1, 1970), cert. den. 400 U.S. 823 (1970). At its inception it involved a challenge to the executive order which created the Culebra Island Naval Defensive Sea Area. The Navy won that legal battle but lost the political war that ensued, which culminated in the cessation in 1975 of all weapons training activities in Culebra Island.

The many complex, intertwining happenings that took place between the *Feliciano* case and the Culebra cease fire are the alleged basis of the present contentions.

In October 1970 Congress enacted the Military Construction Authorization Act of 1971 (PL 91-511, 84 Stat. 1204). Section 611 of this law[109] required the Secretary of Defense

---

[109] "Sec. 611(a) The Secretary of Defense is directed to undertake a study and to prepare a report on the weapons training now being conducted in the Culebra complex of the Atlantic Fleet Weapons Range. This study shall consider all possible alternative, geographical and technological, to the training now taking place in the Culebra complex, and shall contain specific recommendations for together with the estimated costs of, moving all or a part of such activities to a new site or sites, and appropriately modifying such activities to minimize danger to human health and safety. In addition, such study shall consider the feasibility of resettling the people of Culebra to another location in the Commonwealth of Puerto Rico, the cost of such a move, and the attitude of the people of Culebra to a generous resettlement plan that would have to be approved by a majority of the qualified electors of Culebra in a plebiscite. In preparing such study, the Secretary is directed to consider the impact of each of the alternatives on:

(1) the safety and well-being of the people who live on Culebra;

(2) the natural and physical environment of Culebra and adjoining cays and their recreational value;

(3) the development of a sound, stable economy in Culebra;

(4) the unique political relationship of Culebra and Puerto Rico to the United States;

(5) the operational readiness and proficiency of the Atlantic Fleet, and

to study and report to Congress on the weapons training that was being conducted in Culebra with a view to considering "all possible alternatives, geographical and technological, to the training . . . taking place in the Culebra complex." The report should "contain specific recommendations for . . . moving all or part of such activities to a new site or sites . . ." In preparing this report the Secretary was required to consult with the people of Culebra, the Government of Puerto Rico, and with appropriate Federal agencies. Furthermore, the Navy was directed to avoid any increase or expansion of its activities in the Culebra complex.

On January 11, 1971, a document entitled "Agreement" was signed by the Secretary of the Navy, John H. Chafee, the Governor of Puerto Rico, Luis A. Ferré, the President of the Puerto Rican Senate, Rafael Hernández Colón, and the Mayor of Culebra, Ramón Feliciano. This document principally dealt with various self-imposed operational restrictions by the Navy and contained a promise by this agency "to continue to investigate both technological and geographical alternatives to the training done around Culebra."

On April 1, 1971, in compliance with the requirements of Section 611(b) of Public Law 91-544 the Secretary of De-

---

(6) national security.

(b) In preparing the report required by the section, the Secretary shall consult with the people of Culebra, the Government of Puerto Rico, and all appropriate Federal agencies having jurisdiction or special expertise on the subject matter involved. The report required by this subsection shall be transmitted to the President of the United States and to the chairmen of the Committees on Armed Services of the Senate and the House of Representatives no later than April 1, 1971.

(c) Pending the completion of the report required by this section and its review by the President of the United States, the appropriate committee and the Congress, the Department of Navy is directed to avoid any increase or expansion of the present weapons range activities in the Culebra complex and, wherever possible, without degrading the activities, to institute procedures which will minimize interference with the normal activities and the solitude of the people of Culebra." 84 Stat. 1225.

fense, Melvin R. Laird, forwarded to the Congress and the President a report on the weapons training then being conducted in the Culebra complex. As a result of this report the Secretary ordered, among other things, the cessation of explosive bombardment in the Northwest Peninsula of Culebra as of January 1, 1972.

Later that year Congress enacted the Military Construction Authorization Act of 1972 (P.L. 92–145; 85 Stat. 394), in which the Secretary of Defense was directed to prepare "a detailed feasibility study of the most advantageous alternative to the weapons training now being conducted in the Culebra Complex of the Atlantic Fleet Weapons Range." §207, 85 Stat. 401. The standards to be used by the Secretary in determining the most advantageous alternatives were "cost, national security, the operational readiness and proficiency of the Atlantic Fleet, the impact on the environment, and other relevant factors." Id. This report was to be completed by December 31, 1972, and submitted, together with the Secretary's recommendations, to the President and to the chairmen of the Committees on Armed Services of the Senate and the House of Representatives.

This study was in fact submitted by Secretary Laird on December 27, 1972. It showed that the requirements for the Inner Range of the Atlantic Fleet Weapons Range, *which them included both Culebra and Vieques*, would not change substantially through 1985. The study predicted, however, a shift in the kind of operations conducted: naval gunfire support training, which was conducted mostly in the northwest peninsula of Culebra, was projected to decrease, while air-to-ground weapons training, which was principally carried out on Vieques and several rocks and cays west of Culebra, were forecast to increase. Of the five alternate sites studied none was deemed superior to Culebra, although based on the criteria given, Vieques was considered the most advantageous of the alternate sites. However, transfering to Vieques would involve the relocation of the "Culebra training targets to the east end of Vieques with one air-to-ground target two miles off the

northwest tip of Vieques." The Secretary did not recommend this alternative as it was deemed to "significantly reduce the capability of the Inner Range and [to] transfer the training activity from an island with 700 inhabitants to one with 7,000 inhabitants", a situation which the Secretary discarded as not being a prudent course of action. The Secretary, however, indicated that the requirements of weapons systems and training changed with time, and thus the Navy would remain abreast of developments that would modify the study's conclusions, i.e., the Navy was keeping its options open.

Thereafter, in May, 1973, the new Secretary of Defense, Elliot Richardson, indicated to the Secretary of the Navy that in his opinion it was in the long-range interest of the Department of Defense to move the Navy training activities by July 1, 1975 from the Culebra complex *to the islands of Desecheo and Monito*, uninhabited islands lying in the Mona Passage, off the West coast of Puerto Rico and a part thereof. The Secretary stated that *this* move was contingent upon Congress appropriating the funds and on working out "a satisfactory overall arrangement . . . with the Government of Puerto Rico for carrying out the proposed move and for insuring the long-term continuation of the Atlantic Fleet Weapons Range and the Fleet Marine Force Training area."

Later in 1973 Congress enacted the Military Construction Authorization Act of 1974 (P.L. 93–166, 87 Stat. 668)[110] appropriating $12,000,000 to facilitate "the

---

[110] "Sec. 204.(a) In order to facilitate the relocation of the ship-to-shore and other gun fire and bombing operations of the United States Navy from the island of Culebra, there is hereby authorized to be appropriated the sum of $12,000,000 for the construction and equipage of substitute facilities in support of such relocation.

(b) The relocation of such operations from the northwest peninsula of the island of Culebra is expressly conditioned upon the conclusion of a satisfactory agreement to be negotiated by the Secretary of the Navy, or his designee, with the Commonwealth of Puerto Rico and reported to the Committtee on Armed Services of the Senate and the House of Representatives prior to execution of such agreement. The agreement shall provide, among

relocation of the ship-to-shore and other gunfire and bombing operations [from Culebra, and for the] construction and equipage of substitute facilities in support of such relocation." Section 204(b) of this statute then provides that "[t]he relocation of such operations from the northwest peninsula of the Island of Culebra is expressly conditioned upon the conclusion of a satisfactory agreement to be negotiated by the Secretary of the Navy . . . with the Commonwealth of Puerto Rico and reported to the Committees on Armed Services of the Senate and the House of Representatives prior to execution of such agreement." The law further required that this agreement bind the Commonwealth of Puerto Rico to insuring that *Commonwealth lands* suitable to carrying out the relocated operations would be made available for long term continued use of the Atlantic Fleet Weapons Range and the Fleet Marine Forces Training area, "including, but not limited to, present areas and facilities on the Island of Vieques." The agreement also had to have a provision compromising the Commonwealth to refrain from any activity that would interfere with the Navy's

---

other things, that the Commonwealth of Puerto Rico shall insure that (1) Commonwealth lands suitable for carrying out operations of the type referred to in subsection (a) will be made available for the long term continued use of the Atlantic Fleet Weapons Range and Fleet Marine Forces training areas by the Navy, including, but not limited to, present areas and facilities on the Island of Vieques, and (2) any proposed facility or activity which would interfere with the Navy training mission will not be undertaken, including the proposed deep water superport on the Island of Mona, in the event that such agreement includes the use by the Navy of such island or the area adjacent to such island.

(c) Notwithstanding any other provision of law, the present bombardment area on the island of Culebra shall not be utilized for any purpose that would require decontamination at the expense of the United States. Any land sold, transferred, or otherwise disposed of by the United States as a result of the relocation of the operations referred to in subsection (a) may be sold, transferred, or otherwise disposed of only for public park or public recreational purposes.

(d) The funds authorized for appropriation by the section shall remain available until expended." 87 Stat. 668–669.

training mission, including the building of a then proposed deep water super-port on the island of Mona (which is in the vicinity of Monito and Desecheo island), in the event the agreement included the use of said island or nearby areas.

On June 22, 1974 the Secretary of State, Henry Kissinger, in a confidential memorandum to the Secretary of Defense, informed him that President Nixon had decided to end weapons training activities in Culebra by July 1, 1975 and on the Culebra Cays by December 31, 1975. The Secretary of Defense was directed to consider and select alternative sites. "The selection of the *new* site, if . . . in Puerto Rico, [would] be contingent on its being acceptable to the Commonwealth, and the Secretary of Defense should so inform the governor of Puerto Rico." (Emphasis supplied).

Although we can well imagine that the above-described sequence is but the "tip of the iceberg" of the many incidents that culminated in the Culebra cease fire, they are the mainstay of Plaintiffs' contentions and the principal sources of evidence on the record.

Considering these events in the most favorable light to Plaintiffs' contentions, we cannot say that they convince us of the existence of any "agreement" on the part of Defendant Navy not to transfer operations to Vieques, even assuming that such an "agreement" would be legally enforceable or that the Plaintiffs would have proper standing to allege its "violation." The very existance and contents of the January 11, 1971 document, which deals with matters of relative unimportance and ambiguity, militates against our concluding that Defendant Navy would reach a binding agreement to grant the Commonwealth veto powers over its Vieques exercises, without some specific written document to such effect. When we consider the unquestionable proof that Defendant Navy was at the time carrying out at least some of the Culebra operations also in Vieques, it makes it even more unlikely that they would agree to so seriously compromise the Vieques operations without a substantial *quid pro quo* that would ensure the continuity of the training operations somewhere.

The above-quoted internal directives of the various members of the Executive, even if we assume them to have been issued at the express order of the President, are not such orders as give rise to a private, cause of action. *Zabala Clemente v. United States*, 567 F.2d 1140 (C.A. 1, 1977), at 1144:

> ". . . Not all acts and orders of the United States government are so sovereign that they must be treated as commands which create legal duties or standards, the violation of which involves breaking the law. A considerable part of the government's conduct is in the context of an employer-employee relationship, a relationship which includes reciprocal duties between the government and its staff, but not necessarily a legal duty to the citizenry."

Furthermore, these directives, as well as the language in the various Appropriation Acts, cannot be taken out of the context of the circumstances surrounding them.

The above-described chain of events demonstrates that the Commonwealth and the Navy were negotiating for *additional Commonwealth lands* in substitution for the Culebra operations, and that eventually agreement could not be reached as to those lands, which more specifically were the islands of Mona, Monito and Desecheo.[111] Con-

---

[111] The Legislative History of the Military Construction Authorization Act of 1974 reveals the following:

Discussion of § 204 commenced in the Senate on September 13, 1973. It was sparsely debated and passed quickly. As passed in the Senate it read

> "Sec. 204. In order to permit the execution of an order of the Secretary of Defense, dated May 24, 1973, that the Department of the Navy transfer all Atlantic Fleet Weapons range activities now conducted on or near the island of Culebra to the islands of Desecheo and Monito, not later than July 1, 975, there is hereby authorized to be appropriated the sum of $12,000,000 for construction of equipment for substitute facilities, such sums to be available until expended." 119 Cong. Rec. 29651–52 (1973).

On October 11, 1973 the House of Representatives considering the Military Construction Appropriations Act as a whole completely deleted the above section. See House Bill at 119 Cong.Rec. 34200–207. As a re-

gress appropriated $12,000,000 for the purchase of those islands or similar Commonwealth lands, and it wanted to be sure that if it spent these sums in moving from Culebra, the

---

sult of a conference between committees of the House and Senate a new adjusted authorization bill issued. The Report of the Joint Conference stated the Culebra problem thus:

> "The Senate included in their bill authorization for $12 million to relocate the ship-to-shore and other gunfire and bombing operations of the U.S. Navy from the Island of Culebra. The provision was added during a mark-up without any hearing or testimony being taken in support thereof. The House Bill contained no such provision.
>
> This provision in the Senate bill caused much discussion and debate among the conferees regarding the feasibility of relocating this activity from Culebra to the Islands of Desecheo and Monito. This subject has been the subject of considerable concern in both the House and the Senate for the last several years. The House conferees were privileged to have a conference with the Governor of Puerto Rico, the Resident Commissioner and the Mayor of Culebra prior to final conference with Senate conferees.
>
> The restrictive language in Section 204 is a result of discussion with the Governor and others and the conferees believe it provides sufficient protection to the Navy upon relocation of ship-to-shore gunfire operations from Culebra to other Islands mentioned.
>
> The House receded with an amendment."
> 119 Cong.Rec.36857.

The result was the Bill as enacted at 87 Stat. 668.

The Legislative History of the Military Construction Appropriations Act of 1970 reveals that as originally passed in the House there was no section regarding the Culebra transfer. 116 Cong. Rec. 16255, at p. 16263; see also p. 16272. On reaching the Senate § 611 was added. 116 Cong. Rec. 34041. After a joint conference, the section passed as it now reads at 84 Stat. 1225. 116 Cong. Rec. 36132.

Thus the history of the Appropriation acts clearly shows that Congress was referring to "Commonwealth lands", such as the islands of Monito and Desecheo, and not Vieques which is "Navy lands."

Furthermore, it does reveal that § 204 was intended to provide for a two part agreement. The Navy's leaving of Culebra carried with it a *quid pro quo* of transfer to other lands the Commonwealth would help provide. To find that no agreement now exists is just as indicative of the Commonwealth's failure to comply with its part of the bargain behind § 204.

Commonwealth would not do anything in the future to jeopardize these relocated facilities or the "present areas and facilities on the island of Vieques." To interpret the Appropriation Acts as granting the Commonwealth a veto power over Naval operations in Vieques, even assuming its constitutional validity,[112] would not only require a strained construction of these statutes but would, because of the unusual nature of the same, necessitate a more specific mandate to said effect.

It is interesting to note that Plaintiffs have presented no allegation or proof that Defendant Navy has used any of the amounts appropriated pursuant to P.L. 93–166 in the Vieques facilities or otherwise. It would seem that Plaintiffs could easily have established any such spendings, if in fact they do exist, during the course of their extensive pretrial discovery or by inquiry with the General Accounting Office.[113] cf. *United States v. Richardson*, 418 U.S. 166 (1974). Conversely, in the Military Construction Authorization Act of 1976 (P.L. 94–107, 89 Stat. 551), Congress authorized the Secretary of the Navy to "establish or develop military installations and facilities by acquiring, constructing converting, rehabilitating, or installing permanent or temporary public works, including land acquisition, site preparation, appurtenances, utilities, and equipment for the following acquisition and construction:. . . . Atlantic Fleet Weapons Range, Roosevelt Roads, Puerto Rico, $2,128,000." That statute did not otherwise restrict the nature of the spending. See also, Military Construction Authorization Act, 1979 (P.L. 95–356, 92 Stat. 565, at 570).

Furthermore, the evidence of a "transfer" from Culebra to Vieques is far from clear. Although the record shows

---

[112] Cf. *Springer* v. *Philippine Islands*, 277 U.S. 189 (1927); see generally, Dixon, "The Congressional Veto and Separation of Powers: The Executive on a Leash?", 56 N.C.L.Rev. 424 (1978); Leni, "Some Aspects of Separation of Powers", 76 Col. L.Rev. 371 (1976); Note: "Congress, the President, and the Power to Commit Forces to Combat", 81 Harv. L.Rev. 1771 (1968); see also *Buckley* v. *Valeo*, 424 U.S. 1, 120 (1976).

[113] See 31 U.S.C. 103.

that some improvements were made to the Inner Range facilities in Vieques after 1975, not only are these relatively minor in nature, but none were to establish new targets, all of which were in existence prior to 1975.[114] Although there is no question in our mind but that there was an increase in the intensity of operations at Vieques after 1975, this in itself demonstrates that these operations were already taking place in Vieques prior to the Culebra closing.[115]

All of these statistics may be interesting reading, but they really are immaterial to the present issue.[116] Whether or not a transfer as such took place, the same cannot be the basis for a cognizable claim in this Court based on either the First or Fifth Amendments, as Plaintiffs have not

---

[114] Target One (October 1971); strafe target (October, 1971); Target Two (October, 1971); NGFS targets (November, 1973); helicopter post and observation post at Cerro Matias (December, 1969); microwave communication and electronic warfare radar simulator at Cerro Matías (July, 1974); helicopter pad and electronic warfare radar-simulator at Monte Pirata (December, 1975); T.V. Bomb scoring facilities at Cerro Matías (November, 1976); radar for ship positioning and bomb scoring on Cerro Matías (May, 1977); shelters for patrol boats in East Vieques (September, 1976); boat ramps in east Vieques (September, 1978).

[115]

	Last 6 Months in 1973	1974	197 5	197 6	197 7	First 6 Months 1978
Artillery						
Hours	324.1	387.4	272.7	289.0	39.6	132.0
Rounds	2297	29080	13266	8367	225	Not available
Days	20	83	24	26	5	6
Naval Gunfire						
Hours	202.5	644.4	669.4	715.0	106.9	559.7
Rounds	2099	7200	8265	7040	8700	3816
Ships	33	91	74	73	97	39
Days	39	95	85	88	115	49
Air-to-Ground						
Hours	137.9	159.3	362.6	484.41	518.1	819.9
Rounds	33779	49052	59219	30801	107.206	100.196
Sorties	861	309	1638	1141	3438	1924
Dys	42	38	92	92	100	63

[116] They may have a bearing to matters discussed later in this Opinion. See Section IV K.

shown that any such transfer has infringed any cognizable property interest or constitutional right,[117] particularly in view of our findings which negate the existence of an enforceable agreement or mandate.

b. The *restriction of waters in the vicinity of Vieques*

Plaintiffs Medina et al and Zenon et al contend that the restrictions of certain areas of the surrounding waters of Vieques, previously described, interfere with their personal rights and are contrary to the "Foraker Act", 48 U.S.C. 746 and the Federal Relations Act, 48 U.S.C. 731 *et seq.*

Article I, s8, Clause 3 of the United States Constitution accords to the Congress the power: "To regulate commerce with foreign Nations and among the serval states and with the Indian Tribes," Chief Justice Marshall laid down the broad outlines of the commerce power in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824):

> "We are now arrived at the inquiry—what is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution."

In 1865, the Supreme Court in *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713, 724, ruled that navigable waters are public property of the Nation:

> "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose and to the extent necessary of all the navigable

---

[117] That a cause of action may lie under either the First, *Paton* v. *La Prade*, 524 F.2d 862 (C.A. 3, 1975), or the Fifth Amendments, *Jacobson* v. *Tahoe Regional Planning*, 566 F.2d 1353 (C.A. 9, 1977), rev'd in part-sub nom. *Lake County Estates Inc.* v. *Tahoe Regional Planning Agency, Inc.*, U.S. [12 ERC 1881] (March 5, 1979), does not relieve a Plaintiff of the burden of establishing the requisite property right, *Roth* v. *Board of Regents*, 408 U.S. 564 (1972), or other protected constitutional interests. *United States* v. *O'Brien*, 391 U.S. 367 (1968). See also: *Lynch* v. *Household Finance Corp.*, 405 U.S. 538 (1972).

> waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the Nation and subject to all the requisite legislation by Congress.

Further, the Supreme Court has consistently maintained that, insofar as the control over commerce was concerned, more specifically the Commerce Clause, *plenary power* remained in congress. See, *National League of cities v. Usery*, 426 U.S. 833, 840 (1976); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942).

The military's operational restrictions at Vieques were issued by the authority of the Secretary of the Army under the Rivers and Harbors Act of 1889, 33 U.S.C. §1 *et seq.*[118] Sections 1 and 3 of Title 33 grant the authority to restrict access to waters in areas like Vieques. Generally, they commend to the sound judgment of the Secretary decisions on whether navigable waters should be restricted. His judgment is to be founded upon what "the public necessity may require for the protection of life and property." 33 U.S.C. §1. The statute also provides for the issuance of Secretarial regulations, "in the interest of the national defense and for the better protection of life and property on the navigable waters of the United States" for waters under the jurisdiction of the United States likely to be endangered by target practice. 33 U.S.C. §3.

As previously indicated in this opinion, the pertinent regulations respecting the target range at Vieques Island are promulgated at 33 C.F.R. §204.234, establishing, the danger zone, and 33 C.F.R. §207.815, establishing the restricted areas. On their face they are properly issued and fall within the purview of 33 U.S.C. §§1 and 3.

Nowhere have Plaintiffs shown that these restrictions operate to unreasonably restrict the waters from fishing and other activities. The two areas of restricted waters—the one, off the coast in the area of the Naval Ammunition Facility, and the other, off the coast in the Camp García area—extend only 1,500 yards offshore. As previously

---

[118]The secretary of the Army is not named as a defendant herein.

stated, the danger area around the eastern end of Vieques is activated only at times when the range is in operation. Fishermen's notices indicate the schedule of range activities for the following week, designating the areas to be closed and time periods of range activation. Fishing is permitted at all other times.

The Plaintiffs herein have presented absolutely no evidence that Defendant Navy has impermissibly or unilaterally expanded the areas authorized as a danger zone (33 C.F.R. §204.234) or a restricted area (33 C.F.R. §207.815). The navigable waters contiguous to Defendant Navy's weapons training range at Vieques are navigable waters of the United States, and they have been restricted in exactly the manner intended by law and regulations. The Plaintiffs' representations that the Federal Relations Act, 48 U.S.C. §731 *et seq.*, negates Defendant Navy's right to operate in this area are based on a misreading of that law and are contrary to §§734 and 749 of the same. See *PFZ Properties, Inc. v. Train*, 393 F.Supp. 1370, 1382 [7 ERC 1930] (D.D.C., 1975). The waters of Vieques are legitimately restricted by the sovereign in order to protect Plaintiffs' "life and property." Cf. *United States v. Mowat*, 582 F.2d 1194, 1205 (C.A. 9, 1978), cert. den. 99 S. Ct. 458 (1939).

Since Plaintiffs have failed to demonstrate that the above restrictions are unreasonable, it is unnecessary for this Court to reach Plaintiffs' Fifth Amendment taking claims. Again, however, Plaintiffs have failed to demonstrate any property interest of theirs which has been invaded, and indeed, they have none (see *Feliciano*, supra, at 1363–1364), particularly since no one has a property interest capable of being "taken" under the Fifth Amendment, in the fish in the sea. *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284 (1977).

Finally, the Plaintiffs Romero Barceló et al and Medina et al, allege that the United States military operations on the Island of Vieques constitute a denial of freedom of travel as guaranteed by the First Amendment of the United States Constitution. *Feliciano*, supra, at 1364 and 1365, is dispositive of these claims of purported loss of personal

liberties. See also, *Kreitzer v. Puerto Rico Cars, Inc.*, 417 F.Supp. 498, 506 (D.P.R. 1975), aff'd. 535 F.2d 140 (C.A.1, 1976). The evidence presented at trial demonstrates clearly that there is no significant restriction on travel or on use of the beaches around Vieques, particularly when we compare it with the factual situation that existed in the *Feliciano* case.

c. *Allegations that raise non-justicable "political questions."*

Plaintiffs have contended that the training conducted at or around Vieques could be carried out at some other location or that the type of training could be changed or reduced, all without harm to the National defense. Further in line with this position plaintiffs have steadfastly contended that these are matters that should be considered by the Court in this case. In our view, questions dealing with the level and type of training required to maintain the Navy at an adequate level of efficiency, or the determination of the relative merits of various training sites or similar issues, are purely "political" questions which are not justicable unless we are concerned with whether specific legal standards have been violated (ex., whether the level of training violates environmental laws).

Although the principle of nonjusticability is not expressly stated in the Constitution, it derives in part from the doctrine of separation of powers. Provision for the National defense is the responsibility of the executive and legislative branches:

> "The President shall be Commander-in-Chief of the Army and Navy of the United States . . ." U.S. Const., Art. II§2, cl. 1.
>
> "The Congress shall have Power . . . To Delcare War . . . To raise and support Armies . . . To provide and maintain a Navy . . ." U.S. Const., Art. I, §8, cls. 12–14.

Obviously, not every matter affecting the armed forces presents nonjusticiable issues. But there are instances when sound judicial policy dictates restraint. One of these instances is when the controversy presents a "political

question." Chief Justice Marshall perhaps best expressed the role of the judiciary in this regard: "Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

The contours of a political question have been well defined by the Supreme Court;

> "It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker v. Carr*, 369 U.S. 186,217 (1962).

Under the aforementioned criteria, determinations regarding the level, type, and efficacy of naval training present "political" questions. Maintenance and directions of the Navy is constitutionally committed to Congress and the President. There is an obvious lack of standards which a court could employ to make its own determination concerning training. Parenthetically, how would a court determine what training is needed or whether particular training is accomplishing its goal? See *United States v. American Telephone and Telegraph Company*, 551 F.2d 384, 390 (D.C.Cir., 1976). In fact, how would a court decide what was the desired state of readiness without an initial policy determination from the branches of our government re-

sponsible for the conduct of our nation's foreign affairs? See *Mitchell v. Laird*, 488 F.2d 611, 616 (D.C. Cir., 1973); *Pauling v. McNamara*, 331 F.2d 796, 798–9 (D.C. Cir., 1964); cert. den. 377 U.S. 933 (1964). Obviously, the independent resolution of such matters by the court would not express the respect due coordinate branches of government that are charged with the resolution of such matters. There would result not only embarrassment in the area of foreign relations if judicial pronouncements varied with the studied opinion of those to whom the Nation's defense is entrusted, but also a possibility of real harm if our allies question our ability to train our forces and our enemies interpret such contradictions as a sign of military weakness. The importance of this last consideration has been judicially recognized:

> "The decision of the Secretary of War is not open to judicial inquiry. That is fortunate, for if it were open, the ensuing delay would delight our country's enemies." *United States v. 243.2 Acres of Land*, 129 F.2d 678, 683 (2d Cir., 1942). See also *Commonwealth of Massachusetts v. Laird*, 451 F.2d 26 (1st Cir., 1971); *Curran v. Laird*, 420 F.2d 122, 129 (D.C. Cir., 1969).

The Supreme Court has acknowledged on numerous occasions that, in military matters, constitutional provisions have engendered a judicial rule of nonreviewability founded on the concept of separation of powers:

> "But judges are not given the task of running the Army . . . Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to interfere in judicial matters." *Orloff v. Willoughby*, 345 U.S. 83, 93–94 (1953).
>
> "[I]t is difficult to conceive of an area of government activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equiping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodical-

ly subject to electoral accountability. It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973).

"The responsibility for determining how best our Armed Forces shall attend to [the business of fighting or being ready to fight wars] rests with Congress, see U.S. Const., Art. I, §8, cls. 12–14, and with the President." See U.S. Const. Art II§2, cl.1. *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975).

See also *United States v. MacIntosh*, 283 U.S. 605, 622 (1931); *Bertelsen v. Cooney*, 213 F.2d 275, 277 (5th Cir., 1954), cert. den., 348 U.S. 856, rehearing denied, 348 U.S. 890 (1954); *Simmons v. United States*, 406 F.2d 456, 459 (5th Cir., 1969); *Feliciano v. United States*, supra, at 1366.

"Trained professionals, subject to day-to-day control of responsible civilian authorities, necessarily must make comparative judgments on the merits as to evolving methods of training, equiping and controlling military forces with respect to their duties under the constitution. It would be inappropriate for a district judge to undertake this responsibility in the unlikely event he possessed requisite technical competence to do so." *Gilligan v. Morgan*, 413 U.S. at p. 8.

K. *The Environmental Impact Statement and the National Environmental Policy Act*

Plaintiffs claim that Defendant Navy is in violation of the National Environmental Policy Act of 1969, 42 U.S.C. 4331 *et seq.* (hereinafter called "NEPA"), because it has failed to prepare an environmental impact statement ("EIS") as allegedly required by Section 102(2)(c) of said statute. Defendant Navy's defense is two-fold: (1) that Plaintiffs are barred from bringing this action by the doctrine of laches, and (2) that Defendant Navy is not in violation of NEPA.

The Statute establishes as follows: (42 U.S.C. 4332):

"The Congress authorizes and directs that, to fullest extent possible: (1) . . . (2) all agencies of the Federal Government shall: . . .

(c) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on-

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action;

(iv) the relationship between local short term uses of man's environment and the maintenance and enhancement of longterm productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statements, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.

Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the Public as provided by Section 552 of Title 5, and shall accompany the proposal through the existing agency review processes . . ."

A determination of the issues raised herein requires a multi-stepped analysis, the threshold of which is a decision as to whether there is before us a recommendation or report on proposals for (1) legislation, or (2) major federal action. Only if either of these two matters is in question are we required to determine whether said proposal or report significantly affects the quality of the human environment. *Andrus v. Sierra Club*, ___ U.S. ___ (1979), 47 U.S.L.W. 4676 [13 ERC 1161] (June 11, 1979; *Kleppe v. Sierra Club*, 427 U.S. 390 [8 ERC 2169] (1976).

Because we are quite clearly not concerned with any proposed legislation, annual appropriation bills having been definitely excluded by *Andrus v. Sierra club*, supra, from such a contention, we can immediately lay that possibility to rest.

We thus come to a determination of whether Defendant Navy's activities in Vieques are a "recommendation or report on proposals for . . . major Federal actions." This literal approach, however, places a mistaken emphasis on the present day activities rather than on how they were promulgated.

First of all, it is obvious that Defendant Navy's activities in Vieques are the *product* of "recommendation[s] or report[s] on proposals for . . . major federal action." Secondly, the magnitude of the capital investment as well as the over-all nature of the present day activities characterize them as "major." *Jackson County, Missouri v. Jones*, 571 F.2d 1004 (C.A.8, 1978); *Sierra Club v. Hodel*, 544 F.2d 1036 [9 ERC 1449] (C.A. 9, 1976); *City of Rochester v. United States Postal System*, 541 F.2d 967 [9 ERC 1362] (C.A. 2, 1976); *McDowell v. Schelesinger*, 404 F. Supp. 221 (W.D. Mo. 1975); *Prince George's County, Maryland v. Holloway*, 404 F.Supp. 1181 [8 ERC 1549] (D.C.D.C. 1975); *Julis v. City of Cedar Rapids, Iowa*, 349 F.Supp. 88 [4 ERC 1862] (D.C.Ia., 1972)

[5] Although the proposals for much of this action predates the passage of NEPA in 1969, the Vieques operation is in effect part of an on-going project which admittedly, has never been the subject of an EIS. In our opinion, the on-going activities must be the subject of an EIS notwithstanding that the proposals for said actions may have originated in part prior to 1969, because it is clear that Congress did not intend to exempt pre-NEPA recommendations if they have post NEPA impacts. *Lathan v. Brinegar*, 506 F.2d 677, 689, [7 ERC 1049] (C.A.9, 1974); *Life of the Land v. Brinegar*, 485 F.2d 460, 466 [5 ERC 1780] (C.A. 9 1973); cert. den. 416 U.S. 961 (1974); *Jones v. Lynn*, 477 F.2d 885, 889 [5 ERC 1169] (C.A.1, 1973). See S. Report No. 91–296, 91st. Cong., 1st Sess. 21 (1969); 40

C.F.R. 1500.13; Cf. *TVA. v. Hill*, 437 U.S. 153 [11 ERC 1705] (1978).

Considering that Section 102(2)(c) of NEPA, requires the filing of an EIS only if the Federal actions "significantly [affect] the quality of the human environment", and lest our present ruling be miscontrued when considered with prior findings in this case (which in synthesis hold that Defendant Navy's activities do not generally run contrary to the various environmental statutes that have been raised by Plaintiffs), we specify that our present ruling is based on the regulations enacted to implement NEPA.

The regulations of the Council on Environmental quality, in identifying major actions significantly affecting the environment, state (40 C.F.R. 1500.6(a)):

> "The statutory clause 'major federal actions significantly affecting the quality of the human environment' is to be construed by agencies with a view to the overall, cumulative impact of the action proposed, related Federal actions and projects in the area, and further actions contemplated. Such actions may be localized in their impact, but if there is *potential* that the environment may be significantly affected, the statement is to be prepared. Proposed major actions, the environmental impact of which is *likely to be highly controversial*, should be covered in all cases . . ." (Emphasis supplied).

The regulations promulgated by the Department of Defense in compliance with NEPA, in identifying major actions significantly affecting the quality of the human environment, indicate (32 CFR 214.7(a)).

> ". . . In making a judgment in a particular case, it will be necessary for the proponent of the action to assess the expected environmental effects of the actions in conjunction with the intent of the National Environmental Policy Act (NEPA) as implemented by the Council on Environmental Quality (CEQ). It is essential that all the environmental effects of an action be assessed, whether those effects are adverse or beneficial. In determining whether or not the effects of an action are significant, the proponent must evaluate the

> nature and degree of all effects on the environment. *These may be significant even though the environmental effect of the proposed action will be beneficial.* (Emphasis supplied).

Contra: *Hanley v. Kleindienst*, 471 F.2d 823, 830 [4 ERC 1785] (C.A. 2, 1972) cert. den. 412 U.S. 908 [5 ERC 1416] (1973); *Cross-Sound Ferry Services, Inc. v. United States*, 573 F.2d 725, 731 [11 ERC 1889] (C.A. 2, 1978).

At the very least, Defendant Navy is required to show that it adequately consulted with other agencies, and must establish a reviewable environmental record to support its threshold negative determination as to the necessity for preparing an EIS, if that be the case. *Friends of the Earth, v. Butz*, 406 F.Supp. 742 (D. Mon., 1975), rem. for mootness 576 F.2d 1377 (C.A. 9, 1978); *Mid-Shiawasee Cty. Concerned Citizens v. Train*, 408 F. Supp. 650 [8 ERC 1681] (E.D. Mich., 1976), aff'd 559 F.2d 1220 [10 ERC 1432] (C.A. 6, 1977); *Sierra v. Morton*, 514 F.2d 856 [7 ERC 1977] (C.A.D.C., 1975), cert. dism. 424 U.S. 901 (1976), rev. on other grds. 427 U.S. 390 (1976); *Maryland-National Capital Park and Planning Commission v. U.S. Postal Service*, 487 F.2d 1029 [5 ERC 1719] (C.A.D.C., 1973); *Arizona Public Service Co. v. Federal Power Commission*, 483 F.2d 1275 [5 ERC 1619] (C.A.D.C., 1973); *Smith v. City of Cookeville*, 381 F. Supp. 100 (D.C. Tenn., 1974).

The issue of laches is properly a question to be dealt with in connection with the appropriateness of the remedy, rather than substantively.

V. THE REMEDY

The Court has found:

(1) That Defendant Navy is in violation of the Federal Water Pollution Control Act, *supra*, by reason of its lack of a NPDES permit to cover the occasional release or firing of ordnance into the waters of Vieques,

(2) That Defendant Navy is in violation of Executive Order 11593, *supra*, by reason of its failure to nominate to the Secretary of the Interior various sites in Vieques that

may be eligible for listing in the National Register of Historic Places, and/or by its failure to seek the opinion of the Secretary respecting said eligibility, and

(3) That Defendant Navy is in violation of the National Environmental Policy Act, supra, by its failure to file an environmental impact statement in connection with its activities in and around Vieques.

Plaintiffs urge the issuance of an injunction against Defendant Navy prohibiting further military activities in Vieques until such time as there is compliance with all such violations.

The issuance of an injunction in the federal courts is governed by general principles of equity. *Stringer v. United States*, 471 F.2d 381, 384 (C.A. 5, 1973), cert. den. 412 U.S. 943 (1973). See generally, "Developments in the Law-Injunctions", 78 Harv. L.Rev. 994 (1965).

Perhaps the most significant single component in the judicial decision whether to exercise equity jurisdiction and grant permanent injunctive relief, is the court's discretion. Being an extraordinary remedy, it is not granted routinely.

> "We are dealing here with the requirements of equity practice with a background of several hundred years of history. . . . *The historic injunctive process was designed to deter, not to punish.* The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity had distinguished it. The qualities of mercy and practicality have made equity the instrument of nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied."

Hecht Co. v. Bowles, 321 U.S. 321, 329–330 (1944), cited in *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 61 (1975), emphasis added in that case.

> "In shaping equity decrees, the trial court is vested with broad discretionary power. . . Moreover, in constitutional adjudication as elsewhere, equitable reme-

> dies are a special blend of what is necessary, what is fair, and what is workable. 'Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.' . .
>
> "In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots."

Lemon v. Kurtzman, 411 U.S. 192, 200–201 (1973). See *Brown v. Board of Education*, 349 U.S. 294, 300 (1955).

If this balancing of competing interests is required where constitutional rights are at stake, can it be seriously argued that this Court should have a different standard where statutory matters are at issue? We think not. See *Essex County Preservation Association v. Campbell*, 536 F.2d 956, 962 [8 ERC 2156] (C.A. 1, 1976); *Aluli v. Brown*, 431 F.Supp. 602, 611 [10 ERC 1765] (D.C. Hawaii, 1977), rev. in part, opinion, July 9, 1979, [13 ERC 1382] (No. 78–1364, C.A. 9); *State of New York v. Nuclear Regulatory Commission*, 550 F.2d 745, 753–754 [9 ERC 1865] (C.A. 2, 1977); *Ohio v. Callaway*, 497 F.2d 1235 [6 ERC 1633] (C.A. 6, 1974); *Conservation Society of Southern Vermont v. Secretary of Transportation*, 508 F.2d 927 [7 ERC 1236] (C.A. 2, 1974), vacated on other grounds and remanded, 423 U.S. 809 (1975); *Environmental Defense Fund, Inc. v. Froehlke*, 477 F.2d 1033 [5 ERC 1313] (C.A. 8, 1973).

The courts in construing environmental statutes such as NEPA have consistently suggested that the relief afforded be a product of balancing of equities. See *Silva v. Romney*, 473 F.2d 287 [4 ERC 1948] (C.A. 1, 1973); *Environmental Defense Fund, Inc. v. Armstrong*, 352 F.Supp. 50 [4 ERC 1760] (N.D. Cal., 1972), aff'd 487 F.2d 814 (C.A. 9, 1973), cert. den. 416 U.S. 974 (1973), reh. den. 419 U.S. 1041 (1974); *Minnesota Public Interest Research Group v. Butz*, 358 F.Supp. 584, 625 [5 ERC 1251] (D.Minn., 1973), aff'd 498 F.2d 1314 [6 ERC 1694] (C.A. 8, 1974), *en banc*); *East 63rd Street Association v. Coleman*, 414 F.Supp. 1318, 1329 [9 ERC 1192] (S.D.N.Y. 1976), aff'd by order 538 F.2d

309 (C.A. 2, 1976); Cf. *Flint Ridge Dev. Co. v. Scenic Rivers Assn.*, 426 U.S. 776, 787–788 [8 ERC 2137] (1976) reh.den. 429 U.S. 875 (1976); *Aluli v. Brown*, supra.

There are various reasons why injunctive relief is not the appropriate remedy in this case.

To begin with, it is clear in our mind, as previously expounded in this opinion, that the activities of Defendant Navy are not causing any appreciable harm to the Vieques ecology. *Aluli v. Brown*, supra, atpage 611. The violations which we have found, are in substance technicial violations, which must be cured, but do not require the drastic treatment suggested by Plaintiffs. Furthermore, there does not appear any reason why their rectification can not be accomplished in a relatively short period of time. Nor is there any logical connection between the accomplishment of this purpose and ordering a halt to the activities of Defendant Navy, other than as punishment, a purpose for which injunctive relief is not appropriate. See *Hecht Co. v. Bowles*, supra.

[6] Additionally, the Court should take into consideration the delay by Plaintiffs in asserting their claims, as laches has been recognized to be a valid defense to similar suits. See *Ecology Center of Louisiana, Inc. v. Coleman*, 515 F.2d 860, 867 [8 ERC 1186] (C.A. 5, 1975); *Minnesota Public Interest Research Group v. Butz*, supra, p. 619; *Mansfield Area Citizens Group v. United States*, 413 F.Supp. 810 (D.C.Pa., 1976); *Commonwealth of Pennsylvania v. Federal Maritime Commission*, 392 F.Supp. 795, 803 (D.C.D.C., 1975); *Save Our Wetlands Inc. v. U.S. Army Corps of Engineers*, 549 F.2d 1021, 1026 [9 ERC 2026] (C.A. 5, 1977), reh. den. 553 F.2d 100 (C.A. 5, 1977), cert. den. 434 U.S. 836 [10 ERC 1800] (1977); *Sierra Club v. Cavanaugh*, 447 F.Supp. 427 [11 ERC 1580] (D.S.D., 1978); *Woida v. United States*, 446 F.Supp. 1377 [11 ERC 1492] (D.C.Minn., 1978); *Dalsis v. Hills*, 424 F.Supp. 784, 788 [9 ERC 2020] (D.C.N.Y., 1976); *Organizations United for Ecology v. Bell*, 446 F.Supp. 535 [11 ERC 1177] (M.D.Pa., 1978); *Shifler v. Schlesinger*, 548 F.2d 96, 103 (C.A. 3, 1977); *Centerview/Glen Avalon Homeowners Asso-*

ciation v. Brinegar, 367 F.Supp. 633, 639 (C.D. Cal., 1973); *National Association of Government Employees v. Rumsfeld*, 418 F.Supp. 1302, 1304 [9 ERC 1487] (E.D.Pa., 1976); *Smith v. Schlesinger*, 371 F.Supp. 559, 561 (C.D.Cal., 1974); *City of Rochester v. United States Postal Service*, 541 F.2d 967 (C.A. 2, 1976); *Friends of Yosemite v. Frizzell*, 420 F.Supp. 390, 397 [10 ERC 1159] (N.D. Cal. 1976); *Iowa Student Public Interest Research Group v. Callaway*, 379 F.Supp. 714, 720 [6 ERC 1727] (S.D.Ia. 1974). In the present case, Plaintiffs have waited more than eight years since NEPA was enacted in 1969, more than six years since the Federal Water Pollution Control Act was enacted in 1972, and approximately seven years since Executive Order 11593 was promulgated, before filing the present actions notwithstanding that Defendant Navy has been conducting training operations in Vieques since World War II, and in its present intensity, since at least 1975. Plaintiffs' sudden awakening to rights that they have had for such long periods of time can not bring about a halt, and consequent disruption, to activities that have been taking place for at least an equal length of time. Although Plaintiffs' laches should not totally bar their claim we are of the opinion that it strongly militates against the granting of injunctive relief at present.

Lastly, we have not the slightest doubt but that the granting of the injunctive relief sought would cause grievous, and perhaps irreparable harm, not only to Defendant Navy, but to the general welfare of this Nation. It is abundantly clear from the evidence in the record, as well as by our taking judicial notice of the present state of World affairs, that the training that takes place in Vieques is vital to the defense of the interests of the United States.

From an economic and defense standpoint, the United States is an island which must import 90% of its strategic materials over the sea lanes of the World. Petroleum is the single most important commodity moved by sea, the primary sources in the Atlantic seaboard being the Middle East, and secondarily, South America. These sea lanes are also of vital importance in allowing the United States to

meet its international obligations with 41 of the 43 nations with which it has mutual defense treaties.

Thus, our ability to maintain a well trained and effective naval force, even in time of peace, is essential to the National welfare.[119]

The Atlantic Fleet is responsible for providing naval forces throughout a geographic area that extends from as far north as the Arctic, to as far south as the Antarctic as far east as Turkey and as far west as Mexico. These naval forces, include air, submarine, surface, and Marine landing forces, all of which the Atlantic Fleet must combine and integrate. Because of allocated resources, and the extensive gecgraphical area they must protect, these forces are at best marginal, and it is thus imperative that they be kept at the highest state of training possible.

Atlantic Fleet operations are centered around carrier-based high-performance attack aircraft, which according to expert testimony, is the only area wherein United States' naval forces outnumber those of our prospective adversaries. The training of these forces is a three-stage affair: the first six months, which takes place when a carrier returns from a cruise, is taken up with shore leave, maintenance, equipment installation, and the training of the ship's personnel to operate as a platform for aircraft. During this period most of the aircraft are shore-based. During the next six-months the air wing is embarked on the ship and the training is directed towards coordinating the airwing and the ship as a team. It is during this period that the ship is put through the full range of simulated combat conditions, including combined exercises with other components of the Atlantic Fleet, to bring it up to standards for actual deployment during the last 6–8 months of the training cycle.

The island of Vieques is the only place presently available wherein the Atlantic Fleet can conduct the full range of

---

[119] Considering the experience of the residents of Puerto Rico during the blockade in World War II, the ability to maintain free sea lanes to and from the Mainland would seem of some interest to the residents of this Commonwealth.

exercises under conditions similar to simulated combat. It is the only place which possesses the potential or existing capability to conduct combined exercises involving air-to-ground ordnances delivery, Marine amphibious assaults, anti-submarine warfare, surface-to-air missiles, close support bombardment, and electronic warfare; in short everything that a battle group would undertake to secure our sea lanes from interdiction by hostile forces. Furthermore, being that the ultimate mission in combat is the delivery of live ordnance to the enemy, it is an essential element of joining that the personnel be fully exposed to its use, both psychologically and in terms of actual skills. Vieques is the only location presently available wherein this training can be conducted within permissible peace time parameters.

Considering all of the above, the Court is of the opinion that under the present circumstances the continued use of Vieques by Defendant Navy for naval training activities is essential to the defense of the nation and that the enjoining of said activities is not an appropriate relief for the correction ogf the cited statutory violations. Other remedy shall be fashioned. *Lemon v. Kurtzman*, supra.

Wherefore, it is ORDERED, that Defendant Navy, "with all deliberate speed", (*Brown v. Board of Education*, supra, at page 301), proceed to:

1. File for and seek a NPDES permit for the release or firing of ordnance into the waters of Vieques;

2. Nominate to the Secretary of the Interior sites in Vieques that may be eligible for listing in the National Register of Historic Places, and/or seek the opinion of the Secretary respecting said eligibility, and further, take appropriate action for the protection of any such prospective sites pending decision as to their eligibility; and

3. Comply with the provisions of 42 U.S.C. 4332(c).

All other claims are dismissed as well as all claims against Defendants in their individual capacities and against John Doe, Defendants.

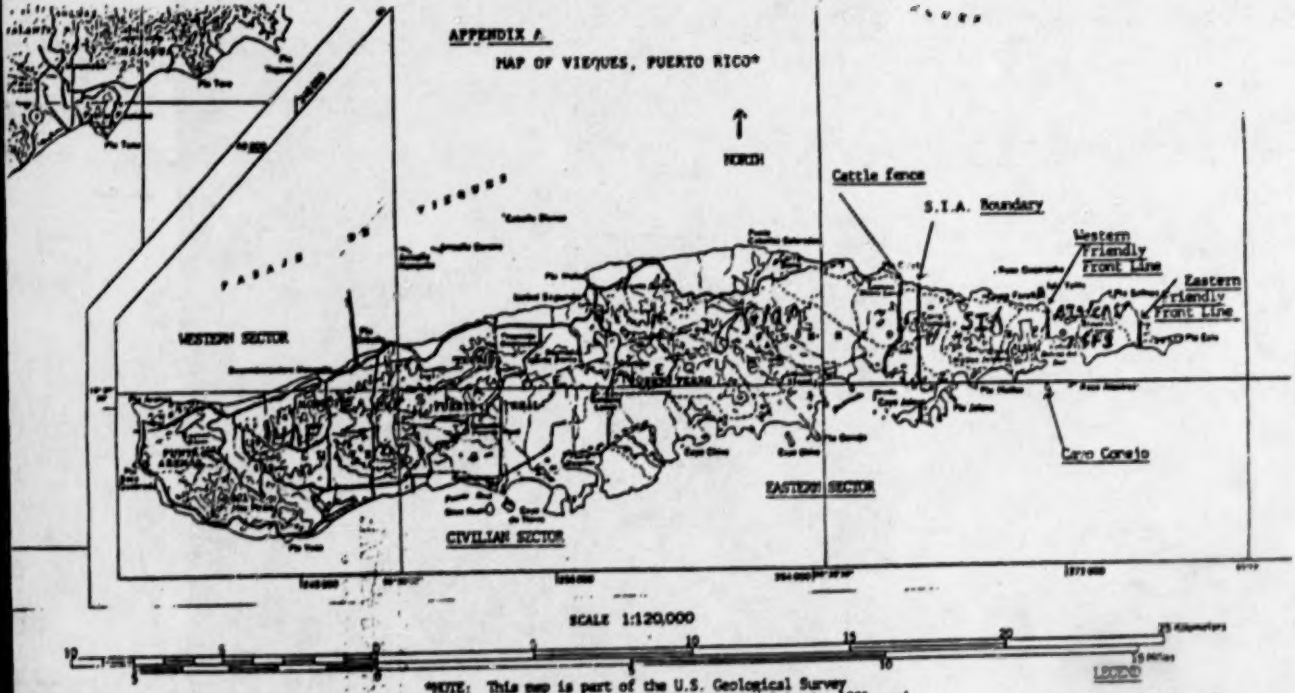
A status conference shall be held before the United States Magistrate within 20 days for the establishment of a

written time table for compliance with this Order, which time table shall be subject to the approval of the Court.

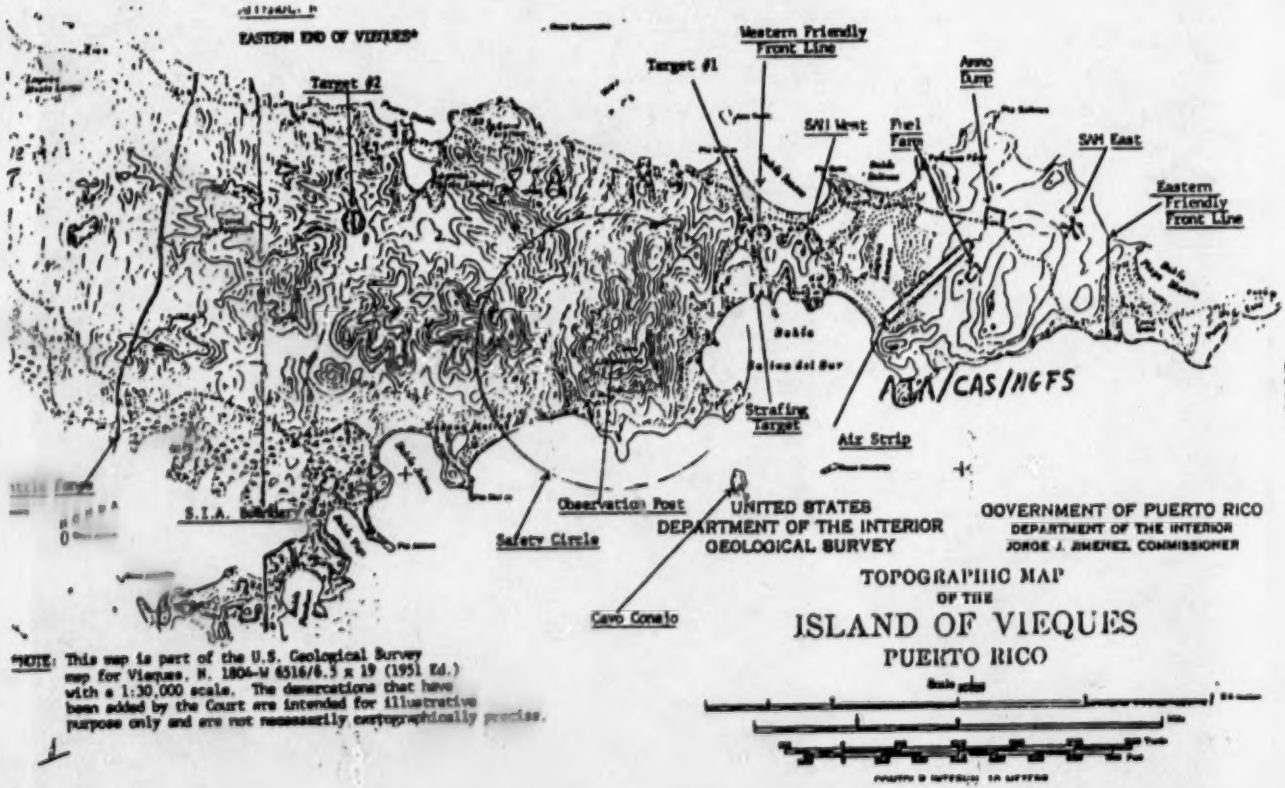
The Clerk shall enter Judgment in accordance with this Opinion.

IT IS SO ORDERED.

[See Appendix A & B]



*NOTE: This map is part of the U.S. Geological Survey Map for Puerto Rico and Surrounding Islands, 1951, and has a scale of 1:120,000. The demarcations that have been added by the Court are intended for illustrative purposes only and are not necessarily cartographically precise.



*NOTE: This map is part of the U.S. Geological Survey map for Vieques, N. 1804-W 6516/8.5 x 19 (1951 Ed.) with a 1:30,000 scale. The demarcations that have been added by the Court are intended for illustrative purpose only and are not necessarily cartographically precise.

Appendix D

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 79–1626

CARLOS ROMERO-BARCELO, ETC., ET AL.,
PLAINTIFFS, APPELLANTS,

CARLOS ZENON, ET AL.,
PLAINTIFFS-INTERVENORS, APPELLEES

v.

HAROLD BROWN, ET AL.,
DEFENDANTS, APPELLEES

CORRECTED JUDGMENT

Entered Nunc Pro Tunc January 26, 1981

This cause came to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The District Court's Findings and Rulings as modified by the opinion of this court filed this day are affirmed except as follows:

(a) the decision with respect to § 15 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 409, is vacated and remanded for dismissal of the claim for lack of jurisdiction;

(b) the decision with respect to § 4 of the Noise Control Act, 42 U.S.C. § 4903(a), and Puerto Rico's criminal nuisance statute, P.R. Laws Ann. tit. 33 § 1365 is vacated and remanded for dismissal of the claim for lack of jurisdiction;

(c) the findings and ruling with respect to § 7(a) and 9 of the Endangered Species Act, 16 U.S.C. §§ 1536(a), 1538, are vacated and remanded for further consideration;

(d) the ruling with respect to Executive Order 11593 and 36 C.F.R. § 800.4 is vacated and remanded for further consideration;

(e) the order with respect to the NPDES Permit Requirement is vacated and remanded with instructions for further proceedings in accordance with the opinion filed this day; and

(f) the order with respect to the preparation and filing of an environmental impact statement pursuant to 42 U.S.C. § 4332(2) (C) is vacated and remanded with directions to dismiss.

No costs.

By the Court:

/s/ _____
DANA H. GALLUP
Clerk.

[cc: Mr. Harker and Ms. Almy.]

Appendix E

STATUTE INVOLVED

The Federal Water Pollution Control Act (Clean Water Act), as amended, 33 U.S.C. (& Supp. III) 1251 *et seq.*, provides in pertinent part:

§ 1251. Congressional declaration of goals and policy

(a) The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

* * * * *

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives

In order to carry out the objective of this chapter there shall be achieved—

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a public-

ly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

* * * * *

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2)(A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title;

* * * * *

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph not later than 3 years after the date such limitations are established, or not later than July 1, 1984, whichever is later, but in no case later than July 1, 1987.

* * * * *

§ 1314. Information and guidelines

* * * * *

(b) Effluent limitation guidelines

For the purpose of adopting or revising effluent limitations under this chapter the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of October 18, 1972, regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations. * * *

* * * * *

§ 1319. Enforcement

(a) State enforcement; compliance orders

(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

* * * * *

(5)(B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this chapter or in any permit issued under this chapter, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 1342 of this title was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an extension of the date referred to in section 1311(b)(1)(A) of this title to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

* * * * *

(b) Civil actions

The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

* * * * *

§ 1323. Federal facilities pollution control

(a) Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee

thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. * * * The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so; except that no exemption may be granted from the requirements of section 1316 or 1317 of this title. No such exemptions shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting such exemption. In addition to any such exemption of a particular effluent source, the President may, if he determines it to be in the paramount interest of the United States to do so, issue regulations exempting from compliance with the requirements of this section any weaponry, equipment, aircraft, vessels, vehicles, or other classes or categories of property, and access to such property, which are owned or operated by the Armed Forces of the United States (including the Coast Guard) or by the National Guard of any State and which are uniquely military in nature. The President shall reconsider the need for such regulations at three-year intervals.

§ 1341. Certification

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. * * * If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

* * * * *

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or

pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for the public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements to paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

* * * * *

§ 1362. Definitions

Except as otherwise specifically provided, when used in this chapter:

* * * * *

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a

well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

(8) The term "territorial seas" means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.

(9) The term "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone.

(10) The term "ocean" means any portion of the high seas beyond the contiguous zone.

* * * * *

(12) The term "discharge of pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * * * *

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture.

* * * * *

§ 1364. Emergencies

(a) Emergency powers

Notwithstanding any other provision of this chapter, the Administrator upon receipt of evidence that a pollution source or combination of sources is presenting an imminent and substantial endangerment to the health of persons or to the welfare of persons where such endangerment is to the livelihood of such persons, such as inability to market shellfish, may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person causing or contributing to the alleged pollution to stop the discharge of pollutants causing or contributing to such pollution or to take such other action as may be necessary.

§ 1365. Citizen suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) Notice

No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator

(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

Office - Supreme Court, U.S.
FILED
NOV 20 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1990

In the Supreme Court of the United States

OCTOBER TERM, 1981

CASPAR WEINBERGER, ET AL.,

Petitioners,

v.

CARLOS ROMERO-BARCELO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOINT APPENDIX

PETITION FOR CERTIORARI FILED, MAY 26, 1981
CERTIORARI GRANTED OCTOBER 5, 1981

TABLE OF CONTENTS

	Page
Chronological List of Relevant Docket Entries	1
Complaint	3
Amendment to Complaint	45
Answer	55
Supplemental Complaint	71
Excerpts from Plaintiffs' Proposed Findings of Fact	73
Excerpts from Plaintiffs' Post-trial Brief	97
Plaintiffs' Exhibits	
CRB-3 1974 Letter from Governor to Secretary of Navy	111
CRB-11 1974 Memo from Deputy Chief of Naval Operations to Vice Chief of Naval Operations	114
CRB-38 1974 Letter from Ramage to Clifford	117
CRB-58 1972 Telegram re Culebra Relocation	119
CRB-67 1971 Memo to Secretary of the Navy, with enclosures	120
CRB-87 1974 Excerpt from Memo—McCorvey	126
CRB-100 1975 Enclosure to Notice from Commander-in-chief, U.S. Atlantic Fleet	132
CRB-114 1973 Memo to Secretary of Navy	135
CRB-116 1974 Memo to Secretary of Defense et al from Kissinger	137
CRB-117 1975 Memo to Wickham from Scowcraft	138
CRB-118 1972 Memo from Laird	139
CRB-120 1970 Letter from Nixon to Governor	142
CRB-123 Charts: U.S. Navy Training Activity, Vieques	145
CRB-126 1973 Telegram from CND Washington to CINCLANTFLT Norfolk	153

Page

CRB-234 1975 Letter from Governor to Secretary of Defense 159

CRB-243 1975 Telegram from CND Washington to CINCLANTFLT Norfolk 168

CRB-332 1971 Letter from Governor to Secretary of Defense 172

CRB-417 Excerpts from Answers to Interrogatories.... 174

CRB-419-421 Five Year Development Plans 176

Order Allowing Certiorari 186

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

1 March 1, 1978 Complaint for declaratory and injunctive relief, filed.

20 March 21, 1978 Amendment to complaint, filed.

50 May 17, 1978 Answer of defts. Harold Brown, Sec. of Defense, W. Graham Claytor Jr., Sec. of the Navy, etc., filed.

71 July 13, 1978 Plff's Carlos Romero Barcelo et als mot. for leave to file supplemental complaint filed, with memo. in support thereof, supplemental complaint, tendered.

Aug. 17, 1978 Order at foot of plffs' mot. for leave to file supplemental complt.: GRANTED. (J. Torruella) s/c Geigel, Hodges, Sec. of Justice, Berkan & Varela, U.S. Atty Carlo, Saade.

82 Aug. 17, 1978 Supplemental complaint, filed.

Aug. 17, 1978 Order at foot of plffs.' Luis Medina et als. for leave to file amended complaint, filed on 7-24-78: GRANTED. (J. Torruella) s/cs to Geigel, Hodges, Sec. of Justice, Berkan & Varela, U.S. Atty., Carlo, Saade.

94 Aug. 29, 1978 Plff's, Carlos Romero Barcelo mot. for amendment of complaint and memo. in support thereof, filed. Second amendment to complaint, tendered

215 Sept. 17, 1979 Decision and Order, dtd. 9-17-79, that the Ct. is of the opinion that under the present circumstances the continued use of Vieques by Deft. Navy for naval training activities is essential to the defense of the Nation and that enjoining of said activities is not an appropriate relief for the correction of the cited statutory violations. It is ordered that the Navy "with all deliberate speed" file for and seek a NPDES permit for release of firing of ordinance into the waters of Vieques; Nominate to the Sec. of Interior sites in Vieques that may be eligible for listing in the National Register of Historic Places, etc., comply with provisions of 42 USCA

4332(c). All other claims are dismissed as well as all claims against deft. in their individual capacities and against John Doe, Deft. A s.c. shall be held before Mag. within 20 days for the establishment of a written time-table for compliance with this Order, which time table shall be subject to approval of the Ct. Clerk shall enter Judgment accordingly, filed and entered (J. Torruella) S/cs to U.S. Atty., G. Carlo, P. Saade, J. Berkan, W. Geigel and J. L. Cordova.

229 Nov. 14, 1979 Plff's notice of appeal of ct's judgmt. ent'd on 9-17-79, fld. S/sc to Appeal Clerk

230 Nov. 19, 1979 Judgment that U.S. Navy "with all deliberate speed" proceed to: file for and see a NPDES permit for the release of firing ordinance into the waters of Vieques nominate to the Sec. of the Interior sites in Vieques that may be eligible for listing in the National Register of Historic Places, and/or seek the opinion of the Sec. respecting said eligibility and further take appropriate action for the protection of any such prospective sites pending decision as to their eligibility etc. and that all other claims be and are hereby dismissed as well as all claims against defts. in their individual capacities and against John Doe defts. fld. and ent'd (Clerk) S/cs to J.A. Hodges, Harker, Rivlin, Geigel, G. Carlos, Sec. of Justice, P. Saade, P. Varela and J. Berkan.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil Action No. 78-323

CARLOS ROMERO BARCELO, Governor of Puerto Rico, on his own behalf and on behalf of the Commonwealth of Puerto Rico and THE PEOPLE OF PUERTO RICO,

and

THE COMMONWEALTH OF PUERTO RICO,

and

BOARD ON ENVIRONMENTAL QUALITY OF PUERTO RICO,

and

RADAMES TIRADO GUEVARA, *Mayor, Vieques*, PLAINTIFFS

v.

HAROLD BROWN, Secretary of Defense,

and

W. GRAHAM CLAYTOR, JR., Secretary of the Navy,

and

JAMES L. HOLLOWAY, Chief of Naval Operations,

and

I. C. KIDD, JR., Commander-in-Chief, Atlantic Fleet,

and

LOUIS H. WILSON, Commandant,
United States Marine Corps, DEFENDANTS

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I.

NATURE OF THE ACTION

1. Plaintiffs seek a declaration that certain actions of officers of the Department of Defense ("DoD") and the

Department of the Navy ("Navy") and their agents that result in ongoing and increasing significant adverse environmental effects on the island of Vieques, its surrounding waters, and its people, constitute violations of various federal and local laws. Plaintiffs also seek preliminary and permanent injunctive relief requiring Defendants to comply fully with such laws and to cease their illegal activities.

II.

JURISDICTION

2. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331 (Federal Question); 28 U.S.C. § 1332 (Diversity); 28 U.S.C. § 1361 (Mandamus); 28 U.S.C. § 1337 (Commerce); 28 U.S.C. §§ 2201-02 (Declaratory Judgment); 5 U.S.C. §§ 701-06 (Administrative Procedure); 16 U.S.C. § 470 (Historic Preservation); 16 U.S.C. § 1651 (Coastal Zone Management); 16 U.S.C. § 1540 (Endangered Species); 33 U.S.C. § 466 (Water Pollution); 33 U.S.C. § 1415 (Marine Protection); 42 U.S.C. § 4321 (National Environmental Policy Act); 42 U.S.C. § 4911 (Noise); 42 U.S.C. § 6961 (Resource Recovery); 42 U.S.C. § 7401 (Clean Air). The amount in controversy herein exceeds Ten Thousand Dollars, exclusive of interest and costs.

3. There exists between the parties an actual controversy, justiciable in nature, with respect to which Plaintiffs require relief by this Court.

PARTIES

4. Plaintiff Carlos Romero-Barceló is Governor of the Commonwealth of Puerto Rico.

5. Plaintiff the Commonwealth of Puerto Rico includes the island of Vieques.

6. Plaintiff the People of the Commonwealth of Puerto Rico are the "citizens" of Puerto Rico within the meaning of 28 USC 1332.

7. Plaintiff Radamés Tirado Guevara is the Mayor of the island of Vieques, a Municipal Division of the Commonwealth of Puerto Rico.

8. Plaintiff the Board on Environmental Quality is an agency of the Commonwealth of Puerto Rico created by legislation and empowered to protect environmental quality.

9. Defendant Harold Brown is the United States Secretary of Defense and has control and authority over the Department of Defense including its military operations on or in the vicinity of Vieques. Defendant Brown is sued individually and in his official capacity.

10. Defendant W. Graham Claytor, Jr., is the Secretary of the Navy under the direction and control of the Secretary of Defense and has control and authority over all Navy operations including those on or in the vicinity of Vieques. Defendant Claytor is sued individaully and in his official capacity.

11. Defendant James L. Holloway is the Chief of Naval Operations under the direction and control of the Secretary of the Navy and exercises command over the Operating Forces of the Navy including Navy operations on or in the vicinity of Vieques. Defendant Holloway is sued individually and in his official capacity.

12. Defendant I. C. Kidd, Jr. is an Admiral, United States Navy, and the Commander in Chief United States Navy Atlantic Fleet and is in charge of Navy operations on or in the vicinity of Vieques. Defendant Kidd is sued individually and in his official capacity.

13. Defendant Louis H. Wilson is a General, United States Marine Corps, and the Commandant of the United States Marine Corps and is in charge of Marine Corps operations on or in the vicinity of Vieques. Defendant Wilson is sued individually and in his official capacity.

14. No defendant is a "citizen" of Puerto Rico, within the meaning of 28 USC 1332.

IV.

VIEQUES, PUERTO RICO

15. Vieques is an island approximately ten miles off the southeastern coast of the island of Puerto Rico. It has over 9,000 inhabitants. The island is approximately 20 miles long and four miles wide and consists of approximately 33,000 acres of land. It has two towns, Isabel Segunda and Esperanza.

16. The coastal areas of Vieques contain beautiful beaches, coral reefs, mangrove swamps, and rare, environmentally fragile phosphorescent bays. The island contains rich and varied flora and fauna, including rare and endangered species. It has numerous birds, semi-wild horses, and rich marine life supported by coral reefs, mangrove swamps, marine grasses, and beach habitats.

17. Vieques has a long and varied cultural history. The first inhabitants were Carib Indians who came from South America by way of the Lesser Antilles, occupying the island on their way to Puerto Rico and beyond. Other Indians moved to Vieques to escape the Spaniards during the Spanish Conquest of Puerto Rico. During the 17th and 18th centuries the island was occupied by the French, English, Danish and Spanish. The 19th century saw a substantial increase in social and economic development on the island. As a result of the Spanish-American War, Vieques, along with the rest of Puerto Rico, came under the political control of the United States.

18. The Navy has acquired title over 70 percent of the land on Vieques. The Defendants use the major part of the island for weapons training, shore bombardment, aircraft weapons firing, missile launching exercises, and ammunition storage. The coastal waters surrounding Vieques are also used for maneuvers, weapons training, and amphibious operations under the control of Defendants.

19. Navy (which term hereinafter includes the Marine Corps) facilities and operations on Vieques are adjacent to the inhabited areas of the island, which areas are used for residential, educational, recreational, religious, cultural, and commercial activities.

20. Military operations under the control of the Defendants are regularly conducted in coastal waters around Vieques, including waters used for commercial fishing and sport fishing by residents of Vieques and of other areas. Fishing is severely limited because of such operations. Cattle grazing, agriculture and other activities are severely limited because of military operations on and around Vieques. Numerous cattle have been killed by such operations.

21. Aerial bombing, target practice by Navy artillery, strafing attacks by military aircraft, amphibious landings, missile fire, ground force attacks and gunfire and other military operations on and around Vieques (hereinafter some times collectively referred to as "military operations"), all under the control and authority of Defendants, cause water pollution and irreparable damage to the ocean waters, the coastal waters, the coral reefs, mangrove swamps, rare phosphorescent bays, beaches, and bluffs of Vieques and otherwise harm and endanger the natural, historical and archeological resources of Vieques, the coastal zone and the ocean around Vieques.

22. The residents of Vieques, other citizens of Puerto Rico, tourists and others who visit Vieques or its vicinity, are exposed to loud, raucous, excessive and offensive noises and to offensive air pollutants caused by jet aircraft flights, bombing maneuvers, helicopter sorties, aerial strafing, rocket fire, shelling, missile launchings, demolition operations, mortar fire, tank and anti-tank fire, and other gunfire under the control of Defendants. Said noises interfere with human speech, sleep, and other normal and reasonable activities of the residents, inhabitants and vistors of Vieques and others, create

shock waves and are destructive of the property and comfort, enjoyment and health of said persons. Said noise and air pollution deprive Plaintiffs and the residents of Vieques of the full, normal and reasonable enjoyment, use and value of their property.

23. Military activities and operations on and around Vieques have imposed restrictions on and contributed to the increased cost of a safe and plentiful drinking water supply for the residents of the island.

24. Military activities and operations on and around Vieques impose severe restrictions on and unreasonably interfere with the use and development of the island and are thereby destructive of the economic, social and cultural well-being and progress of the residents of Vieques.

25. Artillery target practice, aerial bombings and strafing operations, missile fire and gunfire and other military operations under the control of Defendants on and around Vieques pose a significant hazard of immediate injury to the citizens of Puerto Rico and others who reside, work, visit or otherwise frequent Vieques or the water adjacent to it and pose long-term insidious risks to human safety because of the accumulation of hidden unexploded ordnance and because of long-term physical and psychological effects.

26. Military activities and operations under the control of Defendants on and around Vieques adversely affect the health, safety and welfare of the citizens of Puerto Rico and others who reside, work, visit or otherwise frequent Vieques or the waters adjacent to it.

27. Military activities and operations under the control of Defendants on and around Vieques are highly controversial among residents of Vieques, other citizens of Puerto Rico and others because of environmental aspects.

V.

FIRST CLAIM FOR RELIEF

Defendants Have Failed to Prepare Adequate, Detailed Environmental Impact Statements With Respect to Military Activities and Operations on Vieques as Required by the National Environmental Policy Act

28. Plaintiffs reallege and incorporate by reference herein preceding paragraphs 1 through 27 inclusive.

29. Section 102(2)(C) of the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4332(2)(C), directs that all agencies of the Federal government shall, to the fullest extent possible:

> "(C) Include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) The environmental impact of the proposed action,
>
> (ii) Any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) Alternatives to the proposed action,
>
> (iv) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. . . ."

30. Section 102(2)(C) and all other provisions of NEPA became effective on January 1, 1970.

31. Guidelines issued by the Council on Environmental Quality, 40 C.F.R. Part 1500 ("CEQ Guidelines"), Regulations adopted by the Department of Defense, 32 C.F.R. Part 214 ("DoD Regulations"), and Chief of Naval Operations Instructions 6240.2B ("Navy Instructions") apply to Defendants.

32. CEQ Guidelines require: (a) that each federal agency make a detailed assessment of the potential environmental effects of any proposed action and file environmental impact statements for action sincluding "requests for appropriations" that may significantly affect the quality of the human environment (40 C.F.R. §§ 1500.2, 1500.5), and (b) that the statutory clause "major Federal actions significantly affecting the quality of the human environment" is to

> "be construed by agencies with a *view to the overall, cumulative impact of the action proposed, related Federal actions and projects in the area, and further actions contemplated. Such actions may be localized in their impact, but if there is potential that the environment may be significantly affected, the statement is to be prepared.* Proposed major actions, the environmental impact of which is *likely to be highly controversial,* should be covered in all cases." (Emphasis added.) (40 C.F.R. § 1500.6(a).)

33. DoD Regulations require that

> (a) DoD Components shall
>
> "(1) Assess at the earliest practical stage in the planning process and in all instances prior to the first significant point of decision, the environmental consequences of proposed actions.
>
> (2) Review those continuing actions initiated prior to enactment of Pub. L.

91-190 for which the environmental consequences have not been assessed and ensure that any of the remaining actions are consistent with the provisions of this Part." (32 C.F.R. §§ 214.3(b)(1), (2).)

(b) "DoD Components shall insure that a decision is not made until the environmental consequences of the decision have been assessed. If the assessment indicates that the decision will either affect the environment on a large geographical scale or *have a serious environmental effect in a more restricted geographical area*, the proposed action shall be considered a Major Action Significantly Affecting the Quality of the Human Environment (MASAQHE), and the decision shall be deferred until Federal agencies possessing special expertise or *persons affected by the environmental effects of the decision have had an opportunity to present their views.*" (32 C.F.R. § 214.7(b).) (Emphasis added.)

(c) An example of an action that *should be classified as a MASAQHE because of a localized effect is an extremely noisy activity to be conducted by a DoD Component* near a residential area, where the resulting noise might seriously affect the comfort of residents of the area over an extended period. *In keeping with the intent of NEPA, no decision should be made to take any actions until those residents have been given an opportunity to present their views and their views have been carefully considered.*" (32 C.F.R. § 214.7(b)(3).) (Emphasis added.)

(d) "Certain types of actions require close environmental scrutiny because of the possi-

bility that they may either affect the quality of the environment or *create environmental controversy*. It may be desirable in such cases to have a complete presentation of the environmental aspects of the proposed action available for any interested party. For these reasons, consideration shall be given to documenting the environmental effect of the following types of actions in writing:" (Emphasis added.) (32 C.F.R. § 214.7(d).)

> "Production, storage, transportation, testing or disposal of lethal chemical munitions, pesticides, herbicides and containers." (32 C.F.R. § 214.7(d)(6).)
>
> "Mission changes and troop developments which precipitate long-term population increases or decreases in any area, with special attention to the secondary impacts which may cause indirect environmental impact." (32 C.F.R. § 214.7(d)(7).)
>
> "Constructing or installing fences or other barriers that might prevent migration or free movement of wildlife." (32 C.F.R. § 214.7(d)(9).)
>
> "Exercises on or off Federal property, where significant environmental damage might occur regardless of unit sizes." (32 C.F.R. § 214.7(d)(14).)
>
> "Opening areas that were previously closed to the public or closing or limiting of areas that previously were open to public use, such as roads or recreational areas." (32 C.F.R. § 214.7(d)(15).)
>
> "Any action which because of real, potential or purported adverse environmental

consequences, *is a subject of controversy among people who will be affected by the action*, or which, although not the subject of controversy, is likely to create controversy when the proposed action becomes known by the public." (Emphasis added.) (32 C.F.R. § 214.7(d)(21).)

(e) "Even though a written assessment supports the conclusion that an action is not a MASAQHE, an environmental impact statement is to be written on a proposed action which is *highly controversial because of environmental aspects.* The environmental statement should be based on the information contained in the assessment." (Emphasis added.) (32 C.F.R. § 214.7(e).)

(f) "*For those [budget] items which are identified as major actions having a significant effect on the environment, or which are controversial, an environmental impact statement shall be prepared which will accompany the [annual] budget request.*" (Emphasis added.) (32 C.F.R. § 214.6(d)(ii).)

34. Subsequent to January 1, 1970, Defendants or their predecessors in office have undertaken the following federal actions:

(a) Sought Congressional appropriations for the continuation of and increase in a multitude of military operations on and around Vieques as described heretofore in paragraphs 18 through 27 inclusive;

(b) Continued the military operations on and around Vieques as described in paragraphs 18 through 27 inclusive;

(c) Pursued policies resulting in a significant increase in the military operations on and around Vieques as described in paragraphs 18 through 27 inclusive;

(d) Undertaken the annual implementation of the major Navy operations of what is sometimes called Operation Springboard on and around Vieques, conducted as described heretofore in paragraphs 18 through 27 inclusive;

(e) Planned Operation Solid Shield 78, "a major joint service military exercise" using jet fighters, helicopters, Navy vessels, and ground forces on and around Vieques, scheduled for May 10 through May 23, 1978 (42 Fed. Reg. 61049 (Dec. 1, 1977); 42 Fed. Reg. 63181 (Dec. 15, 1977);

(f) Refused or otherwise failed to enact regulations, procedures or policies that would prevent, abate, reduce, mitigate or otherwise control the significant environmental effects of their continuing and increased military operations on and around Vieques as described in paragraphs 18 through 27 inclusive and paragraph 34;

(g) Refused or otherwise failed to evaluate the continuing and increased military operations on and around Vieques as described in paragraphs 18 through 27 inclusive and paragraph 34 in the light of substantial environmental legislation and Executive Orders including the Endangered Species Act, 16 U.S.C. § 1540; the National Historic Preservation Act, as amended, 16 U.S.C. § 470; the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 466; the Marine Protection, Research and Sanctuaries Act, 33 U.S.C. § 1415; the Clean Air Act, as amended, 42 U.S.C. § 7401; the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901; the Noise Control Act of 1972, 42 U.S.C. § 4911; the National Historic Preservation Act, 16 U.S.C. § 470; the Coastal Zone Management Act, 16 U.S.C. § 1451; and Executive Order 11593.

35. Each of the actions described in paragraph 34 is individually a "major federal action significantly affecting the quality of the human environment" for which Defendants and their predecessors in office have been required to prepare adequate, detailed environmental

impact statements pursuant to the provisions of Section 102(2)(C) of NEPA, CEQ Guidelines, DoD Regulations, and Navy Instructions.

36. The actions described in paragraph 34 considered cumulatively constitute a "major federal action significantly affecting the quality of the human environment" for which Defendants and their predecessors in office have been required to prepare adequate, detailed environmental impact statements pursuant to the provisions of Section 102(2)(C) of NEPA, CEQ Guidelines, DoD Regulations and Navy Instructions.

37. Defendants and their predecessors have unlawfully failed to provide an opportunity for Plaintiffs, the residents of Vieques, and others to present their views with respect to each of the actions on and around Vieques as described in paragraph 34.

38. Defendants and their predecessors each year since 1970 and continuing to the present have assisted in the preparation of budget requests that have included funds to be used for military activities and operations on and around Vieques. Defendants and their predecessors have unlawfully failed to file with such budget requests the required adequate, detailed environmental impact statements with respect to such activities and operations on and around Vieques.

39. Defendants and their predecessors have unlawfully failed to prepare adequate, detailed environmental impact statements on the actions as described in paragraph 34 that significantly affect the environment or are controversial.

40. Each of the actions described in paragraph 34 and each of the unlawful acts in paragraphs 37 through 39 are, individually and cumulatively, therefore unlawful actions within the meaning of NEPA, applicable regulations, instructions, and the Administrative Procedure Act, 5 U.S.C. § 706(2).

41. Because of the failure of Defendants and their predecessors to prepare and circulate a detailed, adequate

statement on the impact of each of the actions described in paragraph 34, and because of their failure to discuss alternatives to those actions as required by Section 102(2)(C) of NEPA, Plaintiffs have been deprived of their right to review and to comment adequately upon the proposed actions of Defendants and alternatives to such actions and have been harmed by the resulting military operations.

42. Defendants and their predecessors, having consistently refused or failed to comply with the mandates of Sections 102(2)(C) of NEPA, CEQ Guidelines, DoD Regulations, and Navy Instructions with respect to each action described in paragraph 34, can reasonably be expected to persist in such illegal conduct in the absence of an order from this Court.

43. Such a continued refusal or failure to comply with the requirements of NEPA, CEQ Guidelines, DoD Regulations, and Navy Instructions would cause Plaintiffs irreparable injury for which they have no adequate remedy at law.

WHEREFORE, Plaintiffs request that this Court grant the following relief:

(A) Enter an Order declaring unlawful the refusal or failure of Defendants and their predecessors to prepare an adequate, detailed environmental impact statement with respect to each of the actions described in paragraph 34; and,

(B) Enter an Order declaring unlawful each of the actions described in paragraph 34; and,

(C) Enter an Order declaring that Defendants are required to prepare an adequate, detailed environmental impact statement with respect to each of the actions described in paragraph 34; and,

(D) Issue a mandatory injunction or writ of mandamus directing Defendants to prepare an adequate, detailed statement as to the environmental impact of each of the actions described in paragraph 34; and,

(E) Preliminarily and permanently enjoin Defendants from continuing each of the actions described in paragraph 34 unless and until Defendants comply with the requirements of NEPA, and CEQ Guidelines, DoD Regulations, and Navy Instructions; and,

(F) Grant Plaintiffs their costs and disbursements in this matter; and,

(G) Grant Plaintiffs such other and further relief as the Court may deem appropriate.

VI.

SECOND CLAIM FOR RELIEF

Defendants In The Course Of Conducting Military Operations On And Around Vieques Have Violated The Federal Water Pollution Control Act

44. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 43 inclusive.

45. Section 313 of the Federal Water Pollution Control Act of 1972, as amended, 33 U.S.C. § 1323, and Executive Order 11752 require each department and instrumentality of the executive branch of the federal government to comply with federal, state and local requirements respecting control and abatement of water pollution.

46. Section 301(a) of the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1311(a), makes unlawful "the discharge of any pollutant by any person" without obtaining a permit pursuant to Section 402 of the Act, 33 U.S.C. § 1342.

47. The definition of the term "pollutant" in Section 502(6) of the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1362(6), includes, *inter alia*, "munitions."

48. Defendants, in the course of conducting military operations on and around Vieques, cause the discharge of munitions and other pollutants into the territorial

sea and the contiguous zone surrounding the island, which discharge has, *inter alia*, resulted in soil erosion and the movement of sediment into the coastal waters of Vieques thereby irreparably harming coral reefs and marine life.

49. Upon information and belief, Plaintiffs allege that neither Defendants nor those under their command have secured any permit from authorities that allows them to discharge pollutants into the territorial sea and contiguous zone surrounding Vieques.

50. In discharging pollutants into the territorial sea and contiguous zone surrounding Vieques, Defendants are in violation of Section 301(a) of the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1311(a).

WHEREFORE, Plaintiffs request that this Court grant the following relief:

(A) Declare that Defendants are in violation of the Federal Water Pollution Control Act, as amended, and Executive Order 11752; and,

(B) Preliminarily and permanently enjoin Defendants and their agents from discharging munitions or other pollutants into the territorial sea and the contiguous zone surrounding Vieques until Defendants have complied with the requirements of the Federal Water Pollution Control Act, as amended, and Executive Order 11752; and,

(C) Preliminarily and permanently enjoin Defendants and their agents from failing to perform all acts required of them by the Federal Water Pollution Control Act, as amended; and,

(D) Grant Plaintiffs their costs and disbursements; and,

(E) Grant Plaintiffs such further relief as the Court may deem appropriate.

VII.

THIRD CLAIM FOR RELIEF

Defendants In The Course Of Conducting Military Operations On And Around Vieques Have Violated The Marine Protection, Research and Sanctuaries Act

51. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 50 inclusive.

52. The Marine Protection, Research and Sanctuaries Act, 33 U.S.C. §§ 1401, 1411, 1412, provides that except as may be authorized by permit, no agency of the United States shall transport any material for the purpose of dumping it into ocean waters.

53. Upon information and belief, Plaintiffs allege that agents of Defendants, in the course of conducting military operations on and around Vieques, transport bombs, ordnance and munitions and cause them to be dumped into the ocean waters that surround the island.

54. The dumping of bombs, ordnance and munitions by military personnel under the control of Defendants adversely affects human health, welfare, and amenities, the marine environment, ecological systems, and the economic potentialities of the island.

55. The dumping of bombs, ordnance and munitions by personnel under the control of Defendants has been and is being accomplished without the issuance of a permit by the Administrator of the Federal Environmental Protection Agency.

56. By dumping bombs, ordnance and munitions, in the aforementioned manner, Defendants are violating the requirements of the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. §§ 1401, 1411, and 1412.

WHEREFORE, Plaintiffs request that this Court grant the following relief:

(A) Declare that Defendants are in violation of the Marine Protection, Research and Sanctuaries Act; and

(B) Preliminarily and permanently enjoin Defendants and their agents from utilizing ordnance, bombs and munitions on or around the ocean waters surrounding Vieques until they have complied with the requirements of the Marine Protection, Research and Sanctuaries Act; and,

(C) Preliminarily and permanently enjoin Defendants and their agents from failing to perform all acts required of them by the Marine Protection, Research and Sanctuaries Act; and,

(D) Grant Plaintiffs their costs and disbursements; and,

(E) Grant Plaintiffs such further relief as the Court may deem appropriate.

VIII.

FOURTH CLAIM FOR RELIEF

Defendants In The Course Of Conducting Military Operations On And Around Vieques Have Violated The Water Pollution Laws Of Puerto Rico And The Federal Water Pollution Control Act

57. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 56 inclusive.

58. Puerto Rico's "Water Quality Standards Regulation," duly enacted pursuant to the Laws of Puerto Rico, Title 24 § 598 ("Water Pollution Control Act") and Title 12 § 1131 ("Public Policy Environmental Act"), contains the following definitions in Article 1:

> "Pollutants—Any substance, refuse or waste capable of polluting the waters.
>
> Pollute (to), Pollution—Altering the natural characteristics of a body of water so as to make it in any way harmful or noxious to human health, or to that of animals, or plants, or rendering it ill-smelling or impure or altering adversely its physical, chemical, microbiological or radioactive condition, in such a way as to interfere with the enjoyment of life or

property or violate the standards of purity established by this Regulation."

Article 4 of the "Water Quality Standards Regulation" further provides in part as follows:

> "No person shall cause or permit the pollution of the waters of Puerto Rico, as defined in Article 1 of this Regulation." (Article 4.1.1)
>
> "No person shall cause or permit the discharge of any water pollutant in violation of applicable rules and regulations." (Article 4.1.2)
>
> "Moreover, such rules and regulations shall be deemed to prohibit any discharge that, in the judgment of the Board, prevents or interferes with attainment or maintenance of applicable water quality standards established by this Regulation, by other laws or regulations of the Commonwealth of Puerto Rico, or by any other requirements established by the United States Government pursuant to the Federal Water Pollution Control Act Amendments of 1972 or any applicable legislation." (Article 4.1.2B)

59. The "Water Quality Standards Regulation" of Puerto Rico (§ 2.2.1A) classifies portions of the coastal waters of Vieques as Class SA, which is defined as:

> "Coastal waters whose existing characteristics should not be altered in order to preserve the existing natural phenomena. Toward that end these waters are not intended to be used for any activity, such as swimming, boating and skiing, that might be detrimental to the existing natural phenomena."

60. The "Water Quality Standards Regulation" of Puerto Rico (§ 2.2.2A) classifies portions of the coastal waters of Vieques as Class SB, which is defined as:

> "Coastal waters intended for uses where the human body may come in direct contact with the water (such as complete body submergence); and for use in propagation and preservation of desirable species."

61. The objective of Class SA waters is that they remain as nearly as possible in their natural, pristine state.

62. The uses to be protected in Class SA waters include the conservation of coral reefs and the support of shellfish and other marine life.

63. The objective of Class SB waters is that their use for recreational purposes and aesthetic enjoyment shall not be limited in any way, and these waters shall be used in the propagation and preservation of desirable commercial and other species.

64. The uses to be protected in Class SB waters are recreational, aesthetic enjoyment, and the support and propagation of commercially valuable and other desirable aquatic life.

65. The "Water Quality Standards Regulation" of Puerto Rico (§§ 4.7, 2.1.1) provides as follows:

> "Anti-degradation statement
>
> Waters, whose existing quality as of the effective date of these Regulations, is better than the standards established herein will be maintained at such quality. These and other waters of the Commonwealth will not be lowered in quality unless it has been affirmatively demonstrated to the Board that such a change is justified as a result of necessary economic or social development and will not interfere or become injurious to any assigned uses made of, or presently possible in, such waters. This will require that any industrial, public or private project, or development which would constitute a new source of pollution, or a modified source of pollution, to a high quality water body, possess as a part of the initial project design the best practicable control technology currently available. This decision of the Board shall be preceeded by adequate public notice." (§ 4.7.)

"Solids and other matter

The waters of Puerto Rico shall not contain materials attributable to discharges that will settle to form objectionable deposits. Nor will they contain floating debris, scum, oil and other floating materials attributable to discharges in amounts sufficient to be unsightly or deleterious." (§ 2.1.1.)

66. The discharge of bombs, ordnance and munitions, and other materials into and around the coastal waters of Vieques, and the conducting of military operations on such coastal waters under the direction of Defendants and their predecessors have created craters and other major changes in the coastal lands that have resulted in soil erosion and the movement of sediment into the coastal waters of Vieques thereby, *inter alia*, irreparably harming coral reefs and marine life.

67. The discharge of ordnance, bombs, munitions, oil, scum, debris and other materials into coastal waters of Puerto Rico and the conducting of other military operations on such waters under the direction of Defendants and their predecessors, render such waters harmful to human health and to the health of animals and plants in such a way as to interfere with enjoyment of life and property in violation of Puerto Rico's laws for the control of water pollution.

68. The discharge of bombs, ordnance, munitions, oil, scum, debris and other materials into the coastal waters surrounding Vieques and the conducting of military operations on such waters under the direction of Defendants and their predecessors have caused bombs, ordnance, munitions, oil, scum, debris and other materials to contaminate the coastal waters surrounding Vieques.

69. The discharge of bombs, ordnance, munitions, oil, scum, debris and other materials into coastal waters surrounding Vieques and the conducting of military operations on such waters under the direction of Defendants and their predecessors, violate the standards of quality

for coastal waters set out in the laws and regulations of Puerto Rico.

70. The failure of Defendants to comply with requirements of Puerto Rico respecting control and abatement of water pollution violates Section 313 of the Federal Water Pollution Control Act, as amended, and Executive Order 11752.

WHEREFORE, Plaintiffs request that this Court grant the following relief:

(A) Declare that Defendants are in violation of the Federal Water Pollution Control Act, as amended, and Executive Order 11752, the Water Quality Standards Regulation, the Water Pollution Control Act, and the Public Policy Environmental Act of Puerto Rico; and,

(B) Preliminarily and permanently enjoin Defendants and their agents from discharging bombs, ordnance, munitions, oil, scum, debris and other materials on or around the coastal waters of Vieques until Defendants have complied with the requirements of the aforesaid laws, Executive Order, and regulations; and,

(C) Preliminarily and permanently enjoin Defendants and their agents from utilizing bombs, ordnance and munitions on or around the coastal waters of Vieques until Defendants have complied with the requirements of the aforesaid laws, Executive Order, and regulations; and,

(D) Grant Plaintiffs their costs and disbursements; and,

(E) Grant Plaintiffs such further relief as the Court may deem appropriate.

IX.

FIFTH CLAIM FOR RELIEF

Defendants In The Course Of Conducting Military Operations On And Around Vieques Have Violated The Clean Air Act

71. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 70 inclusive.

72. Section 118 of the Clean Air Act, as amended, 42 U.S.C. § 1857f, requires that each department and instrumentality of the executive branch of the federal government shall comply with State requirements respecting control and abatement of air pollution.

73. Section 4 of Executive Order 11752 requires heads of federal agencies to ensure that all facilities under their jurisdiction conform to State air quality standards.

74. The "Regulation for Control of Atmospheric Pollution" of Puerto Rico provides that "no person shall cause or permit any material to be handled . . . without taking reasonable precautions to prevent particulate matter from becoming airborne." (§ 5.2.1.)

75. The use of ordnance, bombing and munitions on and around Vieques under the responsibility and control of Defendants generates airborne particulate matter that is carried by winds to various areas of Vieques and elsewhere.

76. The activities of Defendants that cause airborne particulate matter to be generated on and around the island of Vieques violate the air pollution standards promulgated by Puerto Rico and consequently violate Section 118 of the Clean Air Act and Executive Order 11752.

WHEREFORE, Plaintiffs request that this Court grant the following relief:

(A) Declare that Defendants are in violation of Puerto Rico's laws and regulations for control of airborne particulate matter, the Clean Air Act, as amended, and Executive Order 11752; and,

(B) Preliminarily and permanently enjoin Defendants and their agents from utilizing ordnance, bombs and munitions on or around the island of Vieques until Defendants have complied with the requirements of such laws and Executive Order; and,

(C) Grant Plaintiffs their costs and disbursements; and,

(D) Grant Plaintiffs such further relief as the Court may deem appropriate.

X.

SIXTH CLAIM FOR RELIEF

Defendants In Conducting Military Operations On And Around Vieques Have Violated The Noise Control Act of 1972

77. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 76 inclusive.

78. Shelling, aerial bombing, artillery practice, straffing attacks by military aircraft, missile fire, ground force attacks, amphibious maneuvers and gunfire and other military operations on and around Vieques all under the control and authority of Defendants create shock waves and excessive noise that unreasonably interfere with the health and welfare of residents of Vieques and other areas of Puerto Rico, and of other persons.

79. The Laws of Puerto Rico, 33 L.P.R.A. § 1365, provide:

> "Anything which is *injurious to health* or is . . . *offensive to the senses* or is an *obstruction of the free use of property* so as to interfere with the *comfortable enjoyment of life or property* by an entire community or neighborhood, or by any considerable number of persons . . . is a public nuisance. . . ." (Emphasis added.)

80. Section 4(b) of the Noise Control Act of 1972, 42 U.S.C. § 4903, and Executive Order 11752 require that each department of the federal government engaged in any activity resulting or that may result in the emission of noise shall comply with State requirements respecting control and abatement of environmental noise.

81. In taking the actions described in paragraph 78 on and around the island of Vieques in a manner that is injurious to health, offensive to the senses, and an obstruction of the free use of property so as to interfere with the comfortable enjoyment of life and property on the island of Vieques, and in other areas of Puerto Rico,

Defendants are creating a public nuisance in violation of 33 L.P.R.A. § 1365 and the Federal Noise Control Act.

WHEREFORE, Plaintiffs request that this Court grant the following relief:

(A) Declare that Defendants are in violation of the Federal Noise Control Act, Laws of Puerto Rico, 33 L.P.R.A. § 1365, and Executive Order 11752; and,

(B) Preliminarily and permanently enjoin Defendants and their agents from utilizing ordnance, bombs and munitions or conducting other military operations on or around Vieques until Defendants have complied with the requirements of the aforesaid acts and Executive Order; and,

(C) Grant Plaintiffs their costs and disbursements; and,

(D) Grant Plaintiffs such further relief as the Court may deem appropriate.

XI.

SEVENTH CLAIM FOR RELIEF

Defendants In The Course of Conducting Military Operations On and Around Vieques Have Violated The Resource Conservation And Recovery Act

82. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 81 inclusive.

83. The Resource Conservation and Recovery Act, 42 U.S.C. § 6961, provides:

> "Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements,

both substantive and procedural (*including any requirement for permits* or reporting or *any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief*), respecting control and abatement of solid waste, or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges." (Emphasis added.)

84. Article 3.1.1 of the "Regulation for the Control of Solid Waste" of Puerto Rico requires that any person operating a sanitary landfill must obtain a permit from the Board on Environmental Quality.

85. Upon information and belief Plaintiffs allege that the military facilities on Vieques under control of Defendants maintain and operate one or more sanitary landfill disposal sites.

86. Upon information and belief Plaintiffs allege that Defendants have failed to obtain a permit from the Board on Environmental Quality for said sanitary landfill disposal sites.

87. In maintaining and operating sanitary landfill disposal sites on Vieques without a permit from the Board on Environmental Quality, Defendants are in violation of the Resource Conservation and Recovery Act.

WHEREFORE, Plaintiffs request that this Court grant the following relief:

(A) Declare that Defendants are in violation of the Regulation for Control of Solid Waste and the Resource Conservation and Recovery Act; and,

(B) Preliminarily and permanently enjoin Defendants and their agents from operating sanitary landfill disposal sites on Vieques until Defendants have met the standards for and obtained a permit as required by Article 3.1.1 of the "Regulation for the Control of Solid Waste"; and,

(C) Preliminarily and permanently enjoin Defendants, and their agents, from failing to perform all acts re-

quired of them by the Resource Conservation and Recovery Act; and,

(D) Grant Plaintiffs their costs and disbursements; and,

(E) Grant Plaintiffs such further relief as the Court may deem appropriate.

XII.

EIGHTH CLAIM FOR RELIEF

Defendants In The Course of Conducting Military Operations On And Around Vieques Have Placed In Jeopardy Endangered Species And Threatened Species And Have Otherwise Violated the Endangered Species Act

88. Plaintiffs reallege and incorporate herein by reference paragraphs 1 through 87 inclusive.

89. Pursuant to Section 7 of the Endangered Species Act of 1973, 16 U.S.C. § 1536, Defendants are required to carry out programs for the conservation of endangered species and threatened species.

90. Pursuant to Section 7 of the Endangered Species Act of 1973, Defendants are required to take such actions as are necessary to insure that actions authorized by them do not jeopardize the continued existence of endangered species and threatened species.

91. Pursuant to Section 7 of the Endangered Species Act of 1973, Defendants are required to take such actions as are necessary to insure that actions authorized by them do not result in the destruction or modification of the critical habitat of endangered species and threatened species.

92. Section 9 of the Endangered Species Act of 1973, 16 U.S.C. § 1538(a)(1)(B), (C), provides that except as otherwise provided in the Act it is unlawful for any person to "take" any endangered species of fish or wildlife within the United States or the territorial sea of the United States or upon the high seas.

93. Section 3 of the Endangered Species Act of 1973, 16 U.S.C. § 1532(14), provides that the term "take" means "to harass, harm, pursue, hunt, shoot, wound, trap, kill, capture or collect or attempt to engage in any such conduct."

94. Section 9 of the Endangered Species Act of 1973, 16 U.S.C. § 1538(a)(1)(G), provides that except as otherwise provided by the Act no person may violate any regulation issued pursuant to the Act pertaining to endangered species or threatened species of fish or wildlife.

95. Section 9 of the Endangered Species Act of 1973, U.S.C. § 1538(a)(2)(D), provides that except as otherwise provided by the Act no person may violate any regulation issued pursuant to the Act pertaining to endangered species or threatened species of plants.

96. On information and belief endangered species and threatened species of fish, wildlife and plants are found on and around Vieques, including, *inter alia*, Hawksbill Turtle (*Eretmochelys imbricata*), Leatherback Turtle (*Dermochelys coriacea*), and Brown Pelican (*Pelecanus occidentalis*).

97. Defendants have violated Section 7 of the Endangered Species Act of 1973 with regard to military operations authorized by them on and around Vieques in that:

(a) Defendants have neglected to carry out any program for the conservation of endangered species and threatened species that may exist on or near the island;

(b) Defendants have neglected to take necessary actions to insure that their operations do not jeopardize the continued existence of endangered species and threatened species that may exist on or near the island; and,

(c) Defendants have neglected to take necessary actions to insure that their operations do not result in the destruction or modification of the habitat of endangered species or threatened species that may be critical to said species.

98. Defendants have violated Section 9 of the Endangered Species Act of 1973 in that Defendants' military operations on and around the island of Vieques constitute an unlawful "taking" of endangered species and a violation of applicable regulations.

WHEREFORE, Plaintiffs request that this Court grant the following relief:

(A) Declare that Defendants are in violation of the Endangered Species Act; and,

(B) Preliminarily and permanently enjoin Defendants and their agents from engaging in military operations on or around Vieques until Defendants have complied with the requirements of the Endangered Species Act; and,

(C) Grant Plaintiffs their costs and disbursements; and,

(D) Grant Plaintiffs such further relief as the Court may deem appropriate.

XIII.

NINTH CLAIM FOR RELIEF

Defendants Have Violated The National Historical Preservation Act And Executive Order 11593 By Failing To Take Adequate Steps With Respect To The Effects of Vieques Military Operations On Historical, Cultural and Archeological Resources

99. Plaintiffs reallege and incorporate herein by reference paragraphs 1 through 98 inclusive.

100. Section 1 of the National Historic Preservation Act, as amended, 16 U.S.C. § 470 ("NHPA"), states:

> "The Congress finds and declares—
>
> (a) that the spirit and direction of the Nation are founded upon and reflected in its historic past;
>
> (b) that the historical and cultural foundations of the nation should be preserved as a living part of

our community life and development in order to give a sense of orientation to the American people. . . ."

101. Section 106 of NHPA, as amended, 16 U.S.C. § 470f, requires that:

> "The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or Federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment with regard to such undertaking."

102. Executive Order 11593 (May 13, 1971), note to 16 U.S.C. § 470, requires federal agencies to inventory and nominate properties under their jurisdiction or control to the National Register of Historic Places ("National Register"). Until such processes are complete, federal agencies must submit any proposal for the "substantial alteration" of federally owned properties eligible for inclusion on the National Register to the Advisory Council on Historic Preservation for review and comment.

103. Executive Order 11593 directs federal agencies to do the following:

> (a) "[E]xercise caution during the interim period until inventories and evaluations . . . are complete to assure that any federally owned property that might qualify for nomination is not inadvertently . . . demolished or substantially altered. The agency head shall refer any ques-

tionable actions to the Secretary of Interior for an opinion respecting the property's eligibility for inclusion on the National Register of Historic Places." (§ 2(b)); and,

(b) "[I]nstitute procedures to assure that Federal plans and programs contribute to the preservation and enhancement of non-federally owned sites, structures and objects of historical, architectural or archeological significance." (§ 1(3).)

104. The Advisory Council to the President and Congress has promulgated Procedures for the Protection of Historic and Cultural Properties (36 C.F.R. Part 800) pursuant to NHPA and Executive Order 11593. Said procedures are applicable to federal agencies and provide in part as follows:

(a) Federal undertakings subject to Section 106 of NHPA and Executive Order 11593 include requests for appropriation and any new or continuing project or program (36 C.F.R. §§ 800.3(c)(1), (2));

(b) "At the earliest stage of planning or consideration of a proposed undertaking," a federal agency shall take the following steps:

(1) Identify properties within the area of the undertaking's potential environmental impact that are included in or eligible for inclusion in the National Register (36 C.F.R. § 800.4(a));

(2) As to such properties, consult with the State Historic Preservation Office (36 C.F.R. § 800.4(a)(2));

(c) Federal projects must be designated as having an adverse effect on properties that are listed on or eligible for listing on the National Register if any condition of the federal undertaking may cause any change in the quality of the historical, archeological, architectural or cultural character that qualifies the property under the National Register and the change is a result of alteration or destruction of part of the property, isola-

tion from or alteration of its surrounding environment, introduction of visual, audible or atmospheric elements that are out of character with the property or alter its setting, or neglect of the property resulting in its deterioration or destruction (36 C.F.R. §§ 800.4(b), 800.8, 800.9);

(d) As to such projects determined to have an adverse effect, the Federal agency must notify the Advisory Council, the State and the public (36 C.F.R. §§ 800.4(e), 800.5(c)) and evaluate feasible alternatives to the project to avoid or mitigate adverse effects (36 C.F.R. § 800.5(d)).

105. Vieques contains two buildings that are included on the National Register of Historic Places:

(a) Fuerte de Vieques, and
(b) Frenchman's House.

106. Vieques contains at least two additional buildings that are of historical significance and are eligible for inclusion on the National Register of Historic Places:

(a) El Faro, and
(b) Tumbas de Le Guidlou.

107. Defendants continuing military activities and operations on Vieques have an adverse effect on at least the following buildings that are included or eligible for inclusion on the National Register:

(a) Fuerte de Vieques,
(b) Frenchman's House,
(c) El Faro, and
(d) Tumbas de Le Guidlou.

108. Defendants' proposed new military activities and operations on Vieques would have an adverse effect on the buildings described in paragraph 107.

109. Defendants have undertaken continuing military activities and operations on Vieques in violation of required procedures to determine whether the undertaking

has an adverse effect on the buildings described in paragraph 107.

110. Defendants have undertaken new military activities and operations on Vieques in violation of required procedures to determine whether the undertaking has an adverse effect on the buildings described in paragraph 107.

111. Defendants have undertaken continuing military activities and operations on Vieques that have an adverse effect on the buildings described in paragraph 107 in violation of required procedures for public disclosure and public consideration of such adverse effects.

112. Defendants have undertaken new military activities and operations on Vieques that have an adverse effect on the buildings described in paragraph 107 in violation of required procedures for public disclosure and public consideration of such adverse effects.

113. Vieques contains sites of historical, cultural or archeological significance that are located within the area of potential environmental impact of Defendants' continuing and new military activities and operations.

114. Defendants have undertaken continuing and new military activities and operations on Vieques in violation of required procedures to locate, evaluate, inventory and nominate to the Secretary of the Interior sites that are eligible for inclusion on the National Register.

115. Defendants have undertaken continuing and new military activities and operations on Vieques in violation of their duty to assure that any federally owned property that might qualify for nomination to the National Register is not destroyed, or substantially altered, has its surrounding environment altered, or suffers from visual, audible or atmospheric elements that are out of character with the property or the setting, before it has been located and evaluated for eligibility in accordance with required procedures.

116. Defendants have continued military activities and operations and have authorized new military activities

and operations on Vieques that are inherently destructive to and otherwise adversely affect sites of historical, cultural and archeological significance to Plaintiffs without attempting adequately to locate, evaluate, inventory or nominate to the Secretary of Interior sites that may qualify for inclusion on the National Register.

117. Defendants have undertaken military activities and operations and have continued to authorize military activities and operations that have substantially altered and otherwise adversely affect sites that are included on the National Register and other sites of historical, cultural and archeological significance that may be eligible for inclusion on the National Register.

118. Defendants' continuing and new military activities and operations on and around Vieques are in violation of the requirements of the Section 106 of NHPA, of Executive Order 11593, and of regulations issued thereunder.

WHEREFORE, Plaintiffs request that this Court grant the following relief:

(A) Declare that Defendants are in violation of the National Historic Preservation Act, as amended, Executive Order 11593 and 36 C.F.R. Part 800; and,

(B) Preliminarily and permanently enjoin Defendants and their agents from engaging in military activities and operations until Defendants have complied with the requirements of the aforesaid statute, Executive Order, and regulations; and,

(C) Grant Plaintiffs their costs and disbursements; and,

(D) Grant Plaintiffs such further relief as the Court may deem appropriate.

XIV.

TENTH CLAIM FOR RELIEF

Defendants In the Court of Conducting Military Operations On And Around Vieques Have Violated The Coastal Zone Management Act

119. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 118 inclusive.

120. The Coastal Zone Management Act, 16 U.S.C. §§ 1451-64, requires that federal activity affecting areas subject to an approved coastal management program must to the maximum extent practicable be consistent with that program. 16 U.S.C. § 1456(c).

121. The Commonwealth of Puerto Rico has developed and submitted for approval to the United States Department of Commerce a coastal zone management program (hereinafter "the program"). The program is designed to protect coastal areas of Vieques and other coastal areas of Puerto Rico.

122. Approval of the program by the Department of Commerce is expected shortly.

123. Military operations on Vieques under the direction of Defendants are inconsistent with the program and threaten irreparable harm to certain coastal zone areas covered by it.

124. Such harm would render nugatory the approval of the program with respect to the affected coastal zone areas of Vieques.

WHEREFORE, Plaintiffs request that this Court grant the following relief:

(A) Declare that Defendants are in violation of the Coastal Zone Management Act; and,

(B) Preliminarily and permanently enjoin Defendants and their agents from military operations that would harm coastal zone areas subject to the program; and,

(C) Grant Plaintiffs their costs and disbursements; and,

(D) Grant Plaintiffs such further relief as this Court may deem appropriate.

XV.

ELEVENTH CLAIM FOR RELIEF

Defendants Have So Planned, Authorized, Directed And Conducted Military Operations On And Around Vieques As To Maintain A Public Nuisance

125. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 124 inclusive.

126. Defendants' actions affecting Vieques as described in paragraphs 18 through 27 and 34 have been conducted in such a manner, under such circumstances and to such an extent as to harm the environment of Vieques and to unreasonably interfere with Plaintiffs' use and enjoyment of their houses and property and of the environment of Vieques and of other areas of Puerto Rico.

127. Defendants have conducted and continue to conduct said operations in such a manner as to greatly impair and diminish the value of Plaintiffs' property.

128. Defendants have conducted and continue to conduct said operations as described in paragraphs 18 through 27 and 34 so as to present an unreasonable hazard to the health and safety of residents of Vieques and of other areas of Puerto Rico and of those persons who visit Vieques and the waters adjacent to it.

129. All acts and facts as set forth in paragraphs 18 through 27 and 34 have been with the knowledge of Defendants and their predecessors in office.

130. All acts as described in paragraphs 18 through 27, 34, and 125 through 129 and in the First through Twelth Claims for Relief of this Complaint constitute a public nuisance under the federal common law and the law of Puerto Rico.

131. Plaintiffs have frequently requested Defendants of their agents to abate said public nuisance but Defendants have neglected and refused to do so.

132. Defendants threaten to continue and intend to continue to maintain said public nuisance and unless restrained therefrom will continue so to maintain it.

133. The continuation of said public nuisance would cause Plaintiffs irreparable injury for which they have no adequate remedy at law.

WHEREFORE, Plaintiffs request that this Court grant the following relief:

(A) Declare that military activities and operations under the control of Defendants on and around Vieques constitute a public nuisance under federal common law and the law of Puerto Rico; and,

(B) Preliminarily and permanently enjoin Defendants and their agents from maintaining military activities and operations on and around Vieques in such a manner as to constitute a public nuisance; and,

(C) Grant Plaintiffs their costs and disbursements; and,

(D) Grant Plaintiffs such other and further relief as the Court may deem appropriate.

XVI.

TWELFTH CLAIM FOR RELIEF

Defendants' Military Operations On and Around Vieques Violate The First and Fifth Amendments To the Constitution and Are Otherwise Unlawful

134. Plaintiffs reallege and incorporate by reference herein preceding paragraphs 1 through 133.

135. The island of Culebra is a Municipality of the Commonwealth of Puerto Rico and is approximately 10 miles from Vieques. Vieques and Culebra are within the Inner Range of the Atlantic Fleet Weapons Range of Defendants.

136. Defendants prior to about July 1975 conducted military operations on Culebra. On or about July 1975, Defendants ceased military operations on Culebra.

137. Military operations of Defendants on Vieques have increased since the time Defendants ceased military operations on Culebra.

138. Defendants have increased military operations on Vieques in whole or in part by transferring to Vieques directly or indirectly all or some of the military operations formerly conducted on Culebra.

139. Such increased military operations on Vieques are in whole or in part the result of, are due to, or have otherwise been caused or brought about by Defendants' termination of the use of Culebra for military operations.

140. Before terminating military operations on Culebra and on subsequent occasions, Defendants agreed with and otherwise made commitments to the Commonwealth of Puerto Rico not to transfer its Culebra military operations to Vieques.

141. The President of the United States as Commander-in-Chief ordered Defendants not to transfer military operations on Culebra to an alternate site in Puerto Rico without approval of the Commonwealth of Puerto Rico.

142. Defendants have neither requested nor obtained approval from the Commonweath of Puerto Rico to move military operations from Culebra to Vieques.

143. Defendants have transferred military operations from Culebra to Vieques without first evaluating the impact of such transfer of the life, liberty and property of the citizens of Puerto Rico.

144. Defendants have transferred military operations from Culebra to Vieques without conforming to Congressional restrictions.

145. Defendants are conducting on Vieques military operations formerly conducted on Culebra in violation of agreements and commitments that Defendants have made to the Commonwealth of Puerto Rico.

146. Defendants have conducted and continue to conduct on Vieques military operations formerly conducted on Culebra in the dangerous, harmful, disruptive, offensive and unlawful manner described in the First through Twelfth Claims for Relief of this Complaint.

147. Defendants have transferred military operations from Culebra to Vieques, as described in paragraphs 138 and 139 in violation of the President's Order and Congressional restrictions relating to any transferral of military activities from Culebra.

148. The transfer to Vieques of military operations formerly conducted on Culebra constitutes unlawful federal action.

149. Transferring to Vieques military operations formerly conducted on Culebra and conducting such military operations in the manner described in paragraphs 138 through 146 constitutes federal action that has caused and is causing irreparable harm to the health and welfare of residents of Vieques so as to constitute a denial of due process of law as guaranteed by the Fifth Amendment to the United States Constitution.

150. Transferring to Vieques of military operations formerly conducted on Culebra and conducting such military operations in the manner described in paragraphs 138 through 146 and without seeking the required approval of the Commonwealth of Puerto Rico constitutes arbitrary federal action that has caused and is causing irreparable harm to the health and welfare of residents of Vieques in violation of procedural due process of law as guaranteed by the Fifth Amendment to the United States Constitution.

151. Transferring to Vieques military operations formerly conducted on Culebra and conducting such military operations in the manner described in paragraphs 138 through 146 without seeking the required approval of the Commonwealth of Puerto Rico and without first evaluating the resulting impact of such federal action on the life, liberty and property of plaintiffs and without first giving an opportunity for public comment on such action and on alternatives to such action constitute arbitrary federal action contrary to law, including, *inter alia*, due process of law guaranteed by the Fifth Amendment to the United States Constitution.

152. Transferring to Vieques military operations formerly conducted on Culebra and conducting such military operations in the manner described in paragraphs 138 through 146 have deprived Plaintiffs of the value of their property so as to constitute a taking of property without just compensation, contrary to the Fifth Amendment to the United States Constitution.

153. Defendants' conducting of continuing and increased military operations on Vieques deprives, prevents, restrains and severely interferes with the ability of the residents of Vieques and others to use and to travel freely or without undue restraint around the public portions of the island of Vieques, including but not limited to its public beaches and the territorial sea of the Commonwealth of Puerto Rico.

154. The federal action taken as described in paragraph 153 constitutes a denial of freedom of travel as guaranteed by the First Amendment of the United States Constitution.

WHEREFORE, Plaintiffs request that this Court grant the following relief:

(A) Enter an Order declaring unlawful each of the actions described in paragraphs 135 through 154; and,

(B) Preliminarily and permanently enjoin Defendants from continuing each of the actions in paragraphs 135 through 154 until Defendants comply with the requirements of law; and,

(C) Grant Plaintiffs their costs and disbursements in this matter; and,

(D) Grant Plaintiffs such other and further relief as the Court may deem appropriate.

Respectfully submitted,

/s/ Miguel Gimenez Munoz
MIGUEL GIMENEZ MUNOZ
Secretary of Justice
Commonwealth of Puerto Rico
San Juan, Puerto Rico

/s/ Gerardo A. Carlo
GERARDO A. CARLO
Special Counsel to the Governor
Commonwealth of Puerto Rico
La Fortaleza
San Juan, Puerto Rico

/s/ John A. Hodges
JOHN A. HODGES
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036

/s/ Timothy L. Harker
TIMOTHY L. HARKER
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
Attorneys for Plaintiffs

PEABODY, RIVLIN, LAMBERT & MEYERS
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036

LEWIS A. RIVLIN
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
Of Counsel

JORGE L. CORDOVA, JR.
Office of the Commonwealth of Puerto Rico
1625 Mass. Ave., N.W.
Washington D.C. 20036
Of Counsel

VERIFICATION

Carlos Romero-Barceló, being first duly sworn, on oath does depose and state that he has read the foregoing Complaint, that he has knowledge of all the matters therein stated and that the same are true in substance and in fact, according to the best of his knowledge, information and belief.

/s/ Carlos Romero-Barcelo
CARLOS ROMERO-BARCELO

Subscribed and sworn to before me this 1st day of March, 1978.

/s/ Jose Manuel Rodriguez Viejo
Notary Public

My commission expires: ————————.

[SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil Action No. 78-323

CARLOS ROMERO-BARCELO, ET AL., PLAINTIFFS

v.

HAROLD BROWN, ET AL., DEFENDANTS

AMENDMENT TO COMPLAINT

TO THE HONORABLE COURT:

Come now plaintiffs in the above captioned case and through their undersigned attorneys hereby amend their complaint by amending paragraphs 46, 48, 49, 84, 85, 86 and 87 to read as set forth below and by adding to the complaint a thirteenth claim for relief as set forth below:

46. Section 301 (a) of the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1311(a), makes unlawful "the discharge of any pollutant by any person" except in compliance with a permit obtained pursuant to Section 402 of the Act, 33 U.S.C. § 1342.

48. (a) Defendants operate a sewage treatment facility on Vieques subject to a National Pollution Discharge Elimination System ("NPDES") permit issued under Section 402 of the Act. The effluent discharge from said sewage treatment plant into the coastal waters of Vieques has been and continues to be in violation of said NPDES permit.

(b) Defendants, in the course of conducting military operations on and around Vieques, cause the discharge of munitions and other pollutants into the territorial sea and the contiguous zone surrounding the island, which discharge has, *inter alia*, resulted in soil erosion and the movement of sediment into the coastal waters of Vieques

thereby irreparably harming coral reefs and marine life.

49. Except for the NPDES permit for the sewage treatment plant, upon information and belief, Plaintiffs allege that neither Defendants nor those under their command have secured any permit from authorities that allows them to discharge pollutants into the territorial sea and contiguous zone surrounding Vieques.

84. The "Regulation for the Control of Solid Waste" of Puerto Rico requires as follows:

a. "No person shall establish or cause the establishment of any new solid waste facility without previously obtaining a permit from the Board." (Article 3.1.1).

b. "No person shall operate or cause the operation of a solid waste facility without applying to the Board for a permit to operate." (Article 3.1.2 A.1).

c. "No person shall operate or cause the operation of any new solid waste collection service without first obtaining a permit to operate from the Board." (Article 3.1.3).

d. "No person shall operate or cause the operation of an existing solid waste collection service without applying for a permit to operate such service, within 60 days of the effective date of this Regulation." (Article 3.1.3).

e. "No person shall cause or permit the occurrence of a solid waste activity . . . without first obtaining a permit from the Board." (Article 3.1.4).

f. "Storage of toxic, hazardous and pathological waste shall be handled in accordance with standards and guidelines of this Board." (Article 4.5).

g. "No person shall cause or permit land pollution. . ." (Article 2.1.1).

h. Land pollution is defined as:

"The presence in and on the land of any solid waste in such quantity, of such nature and duration,

or under such conditions as is or could be injurious to human health or welfare, animal or plant life, or property life, or property, or which interferes with the enjoyment of life or of such property, surface or underground waters, or creates air contaminants, or causes environmental degradation." (Article 1).

i. "No person shall cause or permit the deposit, storage or final disposal of solid waste at any place other than the following:"

> "At a final disposal site authorized by a permit. . ."
>
> "At a solid waste facility authorized by a permit. . ." (Article 2.1.3).

j. "No person shall cause or permit the abandonment of a junk vehicle. . ."

k. Daily operational records for sanitary landfills and submission of periodic reports to the Board are required. (Article 2.2).

l. Representatives of the Board shall ". . . have the right of entry to, upon, or through any premises in which a solid waste facility is located or in which any place required to be maintained under this Regulation is located." (Article 2.2.2).

85. Upon information and belief Plaintiffs allege as follows:

a. Defendants have established, maintained and operated one or more solid waste facilities on Vieques without required permits;

b. Defendants have previously operated a solid waste collection service and currently operate a new solid waste collection service on Vieques without the required permits;

c. Defendants have caused or permitted the occurrence of solid waste activities on Vieques without the required permits;

d. Defendants have stored, handled and otherwise disposed of toxic, hazardous and pathological waste on

Vieques without the required permits and otherwise contrary to standards and guidelines of the Board;

e. Defendant have caused or permitted land pollution on Vieques;

f. Defendants have caused or permitted the deposit, storage or final disposal of solid waste at unauthorized places on Vieques;

g. Defendants have caused or permitted the abandonment of junk vehicles on Vieques;

h. Defendants have failed to maintain required operational records and have failed to submit required periodic reports to the Board for its sanitary lanfill operations on Vieques;

i. Defendants have denied, prevented, and otherwise refused to permit entry by one or more authorized representatives of the Board to, upon or through premises on Vieques used by defendants as solid waste facilities or for solid waste disposal. Said denial of authorized access has occurred on or about March 6, 1978 and on other occasions.

86. In causing solid waste activities, disposing of hazardous waste and establishing and operating solid waste facilities and a solid waste collection service on Vieques without the permits required by the Board on Environmental Quality defendants are in violation of the Regulation for the Control of Solid Waste of Puerto Rico and the Resource Conservation and Recovery Act.

87. In causing or permitting land pollution, the deposit or final disposal of solid waste at unauthorized places, and the abandonment of junk vehicles on Vieques; in failing to maintain operational records, and submit periodic reports to the Board on Environmental Quality with respect to sanitary landfill operations on Vieques; and in denying access to solid waste disposal facilities by representatives of said Board defendants are in violation of the Regulation for the Control of Solid Waste of Puerto Rico and the Resource Conservation and Recovery Act.

XVII.

THIRTEENTH CLAIM FOR RELIEF

Defendants' Military Operations On and Around Vieques Violate the Marine Mammal Protection Act of 1972

155. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 154 inclusive.

156. Under the Marine Mammal Protection Act of 1972, 16 U.S.C. § 1361 et seq., except as otherwise provided in the Act, it is unlawful to "take" marine mammals. The term "take" means "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture or kill any marine mammal." 16 U.S.C. § 1362(13).

157. The Secretary of Commerce in the case of porpoises and other cetaceans and pinnipediae (other than walruses) and the Secretary of Interior (in the case of other marine mammals) on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission, is to prescribe such regulations with respect to the taking and importing of marine mammals as he deems necessary and appropriate to insure that such taking will not be to the disadvantage of the marine mammal species and population stocks and will be consistent with the purposes and policies of the Act. 16 U.S.C. § 1373(a). Such regulations are to be made on the record after an opportunity for an agency hearing on both the Secretary's determination to lift the prohibition of taking and on the regulations. 16 U.S.C. § 1373 (d). In addition to any other requirement of law with respect to agency rulemaking, the Secretary must publish and make available to the public either before or concurrent with the publication of notice in the Federal Register of his intention to prescribe such regulations:

> "(1) a statement of the estimated existing levels of the species and population stocks of the marine mammal concerned;

(2) a statement of the expected impact of the proposed regulations on the optimum sustainable population of such species or population stock;

(3) a statement describing the evidence before the Secretary upon which he proposes to base such regulations; and

(4) any studies made by or for the Secretary or any recommendations made by or for the Secretary or the Marine Mammal Commission which relate to the establishment of such regulations." 16 U.S.C. § 1373 (d).

158. The Secretary may issue permits that authorize the taking of marine mammals. 16 U.S.C. § 1374 (a). Any such permit shall:

"(1) be consistent with any applicable regulation established by the Secretary under section 1373 of this title, and

(2) specify

(A) the number and kind of animals which are authorized to be taken or imported.

(B) the location and manner (which manner must be determined by the Secretary to be humane) in which they may be taken, or from which they may be imported,

(C) the period during which the permit is valid, and

(D) any other terms or conditions which the Secretary deems appropriate." 16 U.S.C. § 1374 (b).

159. On information and belief, military operations on and around Vieques result in the "taking" of marine mammals within the meaning of 16 U.S.C. § 1362 (13).

160. On information and belief, Defendants have not obtained a permit to take marine mammals on and around Vieques.

160. On information and belief, Defendants have not obtained a permit to take marine mammals on and around Vieques.

161. On information and belief, the Secretary has promulgated no regulations with respect to the taking of marine mammals on and around Vieques.

162. Defendants have violated the Marine Mammal Protection Act of 1972 in that they have unlawfully taken marine mammals on and around Vieques without a permit.

WHEREFORE, Plaintiffs request that this Court grant the following relief:

(A) Declare that Defendants are in violation of the Marine Mammal Protection Act of 1972; and

(B) Preliminarily and permanently injoin Defendants and their agents from engaging in military operations on or around Vieques until Defendants have complied with the requirements of the Marine Mammal Protection of 1972; and,

(C) Grant Plaintiffs their cost and disbursements; and,

(D) Grant Plaintiffs such further relief as the Court may deem appropriate.

Respectfully submitted,

/s/ Miguel A. Gimenez Munoz
MIGUEL A. GIMENEZ MUNOZ
Secretary of Justice
Commonwealth of Puerto Rico
San Juan, Puerto Rico

/s/ Gerardo A. Carlo
GERARDO A. CARLO
Special Counsel to the Governor
Commonwealth of Puerto Rico
La Fortaleza
San Juan, Puerto Rico

/s/ John A. Hodges
JOHN A. HODGES
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036

/s/ Timothy L. Harker
TIMOTHY L. HARKER
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
Attorneys for Plaintiffs

PEABODY, RIVLIN, LAMBERT & MEYERS
1150 Connecticut Ave. N.W.
Washington, D.C. 20036

LEWIS A. RIVLIN
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036

JORGE L. CORDOVA, JR.
Office of the Commonwealth of Puerto Rico
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036
Of Counsel

VERIFICATION

I, Carlos Romero-Barceló, being first duly sworn, on oath do depose and state that I have read the foregoing Amendment to Complaint, that I have knowledge of all the matters therein stated and that the same are true in substance and in fact, according to the best of my knowledge, information and belief.

/s/ Carlos Romero-Barceló
CARLOS ROMERO-BARCELO

Aff. No. 2,065

Subscribed and sworn to before me this 21 day of March, 1978.

/s/ Felix Fumero Pugliessi
Notary Public

[SEAL]

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Amendment To Complaint have on this 21st day of March, 1978, been served on Julio Morales Sánchez, Esq., U.S. District Attorney, San Juan, Puerto Rico; on Pedro J. Varela, Esq., Attorneys for Luis Medina, et al; and on Pedro J. Saade, Esq., Attorney for Carlos A. Zenón, et al, by first class mail, postage prepaid.

/s/ Miguel A. Gimenez Muñoz
MIGUEL A. GIMENEZ MUNOZ
Secretary of Justice
Commonwealth of Puerto Rico
San Juan, Puerto Rico

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 78-323

CARLOS ROMERO-BARCELO,
Governor of Puerto Rico, ET AL., PLAINTIFFS

v.

HAROLD BROWN,
Secretary of Defense, ET AL., DEFENDANTS

ANSWER

The defendants, Harold Brown, Secretary of Defense; W. Graham Claytor, Jr., Secretary of the Navy; James L. Holloway, Chief of Naval Operations; I. C. Kidd, Jr., Commander-in-Chief, Atlantic Fleet, United States Navy; and Louis H. Wilson, Commandant, United States Marine Corps, for their answer to the amended complaint filed herein plead as follows:

FIRST AFFIRMATIVE DEFENSE

Any and all actions by defendants, of which plaintiffs complain, were done by them as officials of the United States Department of Defense or United States Department of the Navy, in the course of their official duties and were within the scope of those duties, and for this reason they cannot be sued in their individual capacities.

SECOND AFFIRMATIVE DEFENSE

This Court lacks jurisdiction over the persons of defendants in their individual capacities.

THIRD AFFIRMATIVE DEFENSE

Defendants, not having been served personally with process in a proper manner, are not properly before this Court as parties in their individual capacities.

FOURTH AFFIRMATIVE DEFENSE

Plaintiffs' First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, Twelfth, and Thirteenth Claims for Relief fail to state claims upon which relief can be granted.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff Radames Tirado Guevara lacks standing to raise his Fourth Claim for Relief.

SIXTH AFFIRMATIVE DEFENSE

Plaintiffs' Sixth and Eleventh Claims for Relief are barred by the doctrine of laches as the result of the passage of time and resulting prejudice to the defendants, to the Federal Government, and to the general public.

SEVENTH AFFIRMATIVE DEFENSE

This Court lacks jurisdiction over plaintiffs' Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Claims for Relief because of plaintiffs' failure to comply with applicable statutory notice provisions.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs have failed to exhaust their administrative remedies relative to their Fourth Claim for Relief. Plaintiffs have also failed to exhaust the administrative remedies prescribed by the Federal Tort Claims Act for all their claims sounding in tort.

NINTH AFFIRMATIVE DEFENSE

Plaintiffs' Fourth and Tenth Claims for Relief do not present a case or controversy ripe for judicial resolution.

TENTH AFFIRMATIVE DEFENSE

Even if the Puerto Rican public nuisance statute were construed to be a "state . . . requirement respecting control and abatement of environmental noise" within the

context of the Noise Control Act of 1972, such a requirement would be unconstitutionally void for vagueness.

ELEVENTH AFFIRMATIVE DEFENSE

This Court lacks subject matter jurisdiction over plaintiffs' Fourth, Fifth, Sixth, Eleventh, and Thirteenth Claims for Relief, those portions of plaintiffs' Ninth Claim for Relief alleged under Executive Order 11593, and all claims for the award of costs and attorneys' fees except where specifically authorized by statute.

TWELFTH AFFIRMATIVE DEFENSE

The defendants answer the numbered paragraphs of the complaint as follows:

1. This paragraph contains plaintiffs' characterization of their action to which no answer is required, but insofar as an answer may be required, denied.

2. Denied.

3. This paragraph contains conclusions of law to which no answer is required, but insofar as an answer may be required, denied.

4-5. Admitted.

6. This paragraph contains a conclusion of law to which no answer is required.

7-8. Admitted.

9. Admitted, except to deny that defendant Harold Brown is before the Court in his individual capacity.

10. Admitted, except to deny that defendant W. Graham Claytor is before the Court in his individual capacity.

11. Admitted, except to deny that defendant James L. Holloway is before the Court in his individual capacity.

12. Admitted, except to deny that defendant I. C. Kidd, Jr. is before the Court in his individual capacity.

13. Admitted, except to deny that defendant Louis H. Wilson is before the Court in his individual capacity.

14. This paragraph contains a conclusion of law to which no answer is required.

15. Admitted.

16. Admitted, except to state that defendants are without knowledge or information sufficient to form a belief as to the presence, if any, of endangered species or the degree, if any, to which birds, horses, and marine life are supported by coral reefs, mangrove swamps, marine grasses, and beach habitats.

17. Admitted.

18. The first sentence is admitted. The second sentence is denied, as the major portion of the Navy's property on the island is utilized only as a buffer zone for safety reasons. The last sentence is admitted, except to deny that more than a limited portion of the coastal waters surrounding the island is utilized for the described purposes.

19. Denied.

20. The first two sentences are denied, except to admit that some coastal waters around Vieques are periodically utilized for military operations. The third sentence is denied. The last sentence is denied, except to admit a few cattle have been killed by military operations when the animals were improperly present on restricted property owned by the United States.

21. Defendants are without knowledge or information sufficient to form a belief as to the precise nature or amount, if any, of water pollution; damage, harm, and danger alleged in this paragraph, except to deny the characterization of damage to the ocean waters as irreparable.

22. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in this paragraph, except to deny that the noise caused by the described operations is unreasonably destructive to the property, comfort, enjoyment, and health of plaintiffs, or unreasonably deprives plaintiffs of the full and normal enjoyment, use and value of their property.

23.-27. Denied

FIRST CLAIM

28. Defendants reallege and incorporate their answers to paragraphs 1 through 27 of the complaint.

29.-33. These paragraphs contain conclusions of law to which no answer is required, but insofar as an answer may be required, denied.

34. Denied, except to admit that defendants have assisted in the preparation of budget requests which contained funds for operations on Vieques, though not as discrete budget items, except to admit that Operation Springboard has been undertaken each year, and except to admit that Operation Solid Shield 78 was planned, but has now been cancelled.

35.-36. These paragraphs contain conclusions of law to which no answer is required, but insofar as an answer may be required, denied.

37. Denied.

38. Denied, except to admit that defendants have assisted in the preparation of budget requests which contained funds for operations on Vieques, though not as discrete budget items, and that no environmental impact statements were filed. Whether an environmental impact statement is required in such circumstances is a conclusion of law to which no answer is required, but insofar as an answer may be required to that averment, denied.

39. Denied, except to admit that no environmental impact statement has been filed.

40. This paragraph contains a conclusion of law to which no answer is required, but insofar as an answer may be required, denied.

41. This paragraph contains mixed averments of law and fact. All factual averments are denied. Insofar as an answer may be required to the legal conclusions contained in this paragraph, denied.

42. This paragraph contains a conclusion of law to which no answer is required, but insofar as an answer

may be required, denied, except to admit that they have no plans to cease military training operation on Vieques.

43. This paragraph contains conclusions of law to which no answer is required, but insofar as an answer may be required, denied.

The remaining paragraphs of plaintiffs' First Claim for Relief contain plaintiffs' prayer for relief to which no answer is required, but insofar as an answer may be required, denied.

SECOND CLAIM

44. Defendants reallege and incorporate their answers to paragraphs 1 through 43 of the complaint.

45.-47. These paragraphs contain conclusions of law to which no answer is required, but insofar as an answer may be required, denied.

48. (a) Denied, except to admit that defendants operate a sewage treatment facility on Vieques.

(b) Denied, except to admit that occasionally ordnance accidentally falls into the waters surrounding Vieques. Defendants are without knowledge or information sufficient to form a belief as to the precise environmental effects, if any, of such occurrences.

49. Admitted.

50. This paragraph contains a conclusion of law to which no answer is required, but insofar as an answer may be required, denied.

The remaining paragraphs of plaintiffs' Second Claim for Relief contain plaintiffs prayer for relief to which no answer is required, but insofar as an answer may be required, denied.

THIRD CLAIM

51. Defendants reallege and incorporate their answers to paragraphs 1 through 50 of the complaint.

52. This paragraph contains a conclusion of law to which no answer is required, but insofar as an answer may be required, denied.

53. Denied, except to admit that occassionally ordnance accidentally falls into the ocean waters around Vieques while defendants are conducting military training operations.

54. Denied, except to admit that occassionally ordnance accidently falls into the ocean waters around Vieques while defendants are conducting military training operations, and conducting military training operations, and except to state that defendants are without knowledge or information sufficient to form a belief as to the precise environmental effects, if any, of such accidental occurrences.

55. Denied, except to admit that occasionally ordnance accidentally falls into the ocean waters around Vieques, and that no permit has been issued by the Environmental Protection Agency.

56. This paragraph contains a conclusion of law to which no answer is required, but insofar as an answer may be required, denied.

The remaining paragraphs of plaintiffs' Third Claim for Relief contain plaintiffs' prayer for relief to which no answer is required, but insofar as an answer may be required, denied.

FOURTH CLAIM

57. Defendants reallege and incorporate their answers to paragraphs 1 through 56 of the complaint.

58.-65. These paragraphs contain conclusions of law to which no answer is required, but insofar as an answer may be required, denied.

66. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in this paragraph, except to deny plaintiffs' characterization of the alleged harm as irreparable.

67.-68. Defendants deny that oil, scum, or debris is released into the coastal waters of Vieques. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining averments of these paragraphs.

69.-70. These paragraphs contain conclusions of law to which no answer is required, but insofar as an answer may be required, denied.

The remaining paragraphs of plaintiffs' Fourth Claim for Relief contain plaintiffs' prayer for relief to which no answer is required, but insofar as an answer may be required, denied.

FIFTH CLAIM

71. Defendants reallege and incorporate their answers to paragraphs 1 through 70 of the complaint.

72.-74. These paragraphs contain conclusions of law to which no answer is required, but insofar as an answer may be required, denied.

75. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in this paragraph.

76. This paragraph contains a conclusion of law to which no answer is required, but insofar as an answer may be required, denied.

The remaining paragraphs of plaintiffs' Fifth Claim for Relief contain plaintiffs' prayer for relief to which no answer is required, but insofar as an answer may be required, denied.

SIXTH CLAIM

77. Defendants reallege and incorporate their answers to paragraphs 1 through 76 of the complaint.

78. Defendants are without knowledge or information sufficient to form a belief as to the precise level or effects, if any, of shock waves and noise caused by military operations on Vieques, except to deny plaintiffs' characterization of such noise as excessive and the interference caused as unreasonable.

79.-80. These paragraphs contain conclusions of law to which no answer is required, but insofar as an answer may be required, denied.

81. This paragraph contains mixed averments of law and fact. The factual averments are denied, except to

state that defendants are without knowledge or information sufficient to form a belief as to the precise nature and effects, if any, of shock waves and noise caused by military operations on Vieques. Insofar as an answer may be required to the legal conclusions contained in this paragraph, denied.

The remaining paragraphs of plaintiffs Sixth Claim for Relief contain plaintiffs' prayer for relief to which no answer is required, but insofar as an answer may be required, denied.

SEVENTH CLAIM

82. Defendants reallege and incorporate their answers to paragraphs 1 through 81 of the complaint.

83.-84. These paragraphs contain conclusions of law to which no answer is required, but insofar as an answer may be required, denied.

85. Denied, except to admit that defendants have operated and continue to operate a solid waste collection service and sanitary landfill without securing a permit, maintaining the operational record referred to, or submitting periodic reports, and except to admit that defendants refused to allow certain individuals to enter property owned by the Navy until those individuals presented credentials attesting that they were authorized representatives of the Board. Defendants presently are in the process of obtaining a permit and otherwise complying with Puerto Rican requirements respecting the described solid waste collection service and sanitary landfill, and authorized representatives of the Board have been allowed to enter Navy property since presenting their credentials.

86.-87. These paragraphs contain conclusions of law to which no answer is required, but insofar as an answer may be required, denied, except to admit that defendants have operated a solid waste collection service and sanitary landfill without a permit, without maintaining the operational records referred to, and without submitting

periodic reports to the Board. Defendants presently are in the process of securing a permit and otherwise complying with Puerto Rican requirements respecting the solid waste collection service and sanitary landfill.

The remaining paragraphs of plaintiffs' Seventh Claim for Relief contain plaintiffs' prayer for relief to which no answer is required, but insofar as an answer may be required, denied.

EIGHTH CLAIM

88. Defendants reallege and incorporate their answers to paragraphs 1 through 87 of the complaint.

89.-95. These paragraphs contain conclusions of law to which no answer is required, but insofar as an answer may be required, denied.

96. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in this paragraph.

97. This paragraph consists of a single compound sentence which states a conclusion of law to which no answer is required. Insofar as separate allegations of fact are contained therein, they are denied. Defendants have been and are in the process of performing the actions this paragraph alleges they have not taken.

98. This paragraph contains a conclusion of law to which no answer is required, but insofar as an answer may be required, denied.

The remaining paragraphs of plaintiffs' Eighth Claim for Relief contain plaintiffs' prayer for relief to which no answer is required, but insofar as an answer may be required, denied.

NINTH CLAIM

99. Defendants reallege and incorporate their answers to paragraphs 1 through 98 of the complaint.

100.-104. These paragraphs contain conclusions of law to which no answer is required, but insofar as an answer may be required, denied.

105. Admitted.

106. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in this paragraph.

107.-108. Denied, except to state that defendants are without knowledge or information sufficient to form a belief as to the precise effects, if any, of shock waves and noise generated by their military activities and operations upon the described buildings.

109.-112. These paragraphs contain conclusions of law to which no answer is required, but insofar as they contain averments of fact, they are denied, except to state that defendants are without knowledge or information sufficient to form a belief as to the precise effects, if any, of shock waves and noise generated by their military activities and operations upon the described buildings.

113. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in this paragraph.

114.-115. Denied.

116. Denied.

117. Denied.

118. This paragraph contains a conclusion of law to which no answer is required, but insofar as an answer may be required, denied.

The remaining paragraphs of plaintiffs' Ninth Claim for Relief contain plaintiffs' prayer for relief to which no answer is required, but insofar as an answer may be required, denied.

TENTH CLAIM

119. Defendants reallege and incorporate their answers to paragraphs 1 through 118 of the complaint.

120. This paragraph contains a conclusion of law to which no answer is required, but insofar as an answer may be required, denied.

121. Admitted.

122. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averment in this paragraph.

123. Defendants admit that there are certain inconsistencies between their military operations and the proposed program, but deny the remaining averments of this paragraph.

124. Denied.

The remaining paragraphs of plaintiffs' Tenth Claim for Relief containing plaintiffs' prayer for relief to which no answer is required, but insofar as an answer may be required, denied.

ELEVENTH CLAIM

125. Defendants reallege and incorporate their answers to paragraphs 1 through 124 of the complaint.

126. Denied, except to state that defendants are without knowledge or information sufficient to form a brief as to the precise environmental effects, if any, of their military operations.

127. Denied.

128. Denied, except to admit that occasionally ordnance accidentally falls into the waters adjacent to Vieques while military training operations are taking place. Defendants are without knowledge or information sufficient to form a belief as to the precise effects, if any, of such occasional occurrences on those who use said waters.

129. Denied.

130. This paragraph contains a conclusion of law to which no answer is required, but insofar as an answer may be required, denied.

131. Denied, except to admit that a few complaints about military operations have been received by defendants.

132. Denied, except to admit that defendants have no plans to discontinue their military training operations on and in the vicinity of Vieques.

133. This paragraph contains a conclusion of law to which no answer is required, but insofar as an answer may be required, denied.

The remaining paragraphs of plaintiffs' Eleventh Claim for Relief contain plaintiffs' prayer for relief to which no answer is required, but insofar as an answer may be required, denied.

TWELFTH CLAIM

134. Defendants reallege and incorporate their answers to paragraphs 1 through 133 of the complaint.

135. Admitted, except to deny that Culebra is within the Inner Range of the Atlantic Fleet Weapons Range.

136. Admitted.

137. Denied, the types of operations on Vieques have changed to an insignificant degree since the cessation of operations on Culebra, but there has been no increase in the level of military activity or operations on Vieques.

138.-140. Denied.

141. Denied, except to admit that Dr. Henry Kissinger of the National Security Council, acting for the President, directed that military operations be terminated on Culebra, and that the Secretary of Defense should consider and select alternative sites for weapons training activities. The selection of a new site, if it was in Puerto Rico, was contingent upon its being acceptable to the Commonwealth.

142. Admitted, except to deny that such operations have been transferred.

143. Denied.

144.-145. These pargaraphs contain conclusions of law to which no answer is required, but insofar as an answer may be required, denied.

146. Denied.

147.-152. These paragraphs contain conclusions of law to which no answer is required, but insofar as the paragraph contains averments of fact, they are denied.

153. Denied.

154. This paragraph contains a conclusion of law to which no answer is required, but insofar as an answer may be required, denied.

The remaining paragraphs of plaintiffs' Twelfth Claim for Relief contain plaintiffs' prayer for relief to which no answer is required, but insofar as an answer may be required, denied.

THIRTEENTH CLAIM

155. Defendants reallege and incorporate their answers to paragraphs 1 through 154 of the complaint.

156.-159. These paragraphs contain conclusions of law to which no answer is required, but insofar as an answer may be required, denied.

160. Denied, except to admit that no permit has been obtained.

161. Admitted.

162. This paragraph contains a conclusion of law to which no answer is required, but insofar as an answer may be required, denied.

The remaining paragraphs of plaintiffs' Thirteenth Claim for Relief contain plaintiffs' prayer for relief to which no answer is required, but insofar as an answer may be required, denied.

The defendants hereby specifically deny each and every allegation of the complaint not otherwise answered.

Wherefore defendants deny that plaintiffs are entitled to the relief prayed for in their complaint, and request that the complaint be dismissed.

Respectfully submitted,

JAMES W. MOORMAN
Assistant Attorney General

/s/ Julio Morales-Sanchez
JULIO MORALES-SANCHEZ
District of Puerto Rico
United States Attorney

/s/ Dorothy R. Burakreis
DOROTHY R. BURAKREIS
Attorney, Lands and Natural Resources Division
Department of Justice
Washington, D.C. 20530
Attorney for the United States

Dated: May 17, 1978

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that a true copy of the foregoing motion has been mailed on this date to Geradro A. Carlo, Esquire, Special Counsel to the Governor, Commonwealth of Puerto Rico, La Fortaleza, San Juan, P.R.; John A. Hodges, Esquire, 1150 Connecticut Ave. N.W., Washington, D.C. 20036; Pedro J. Saade Llorens, Esquire, Puerto Rico Legal Services, Inc., Environmental Quality Unit, Box 9134, Santurce, P.R. 00908; Judith Berkan, Esquire, Calle Mayaguez # 212, Apt. 3-B, Hato Rey, P.R. 00917; Wilfredo A. Geigel, Esquire, P.O. Box. 9187, Santurce, P.R. 00908.

/s/ Julio Morales Sanchez
JULIO MORALES SANCHEZ
United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil Action No. 78-323

CARLOS ROMERO-BARCELO,
Governor of Puerto Rico, ET AL., PLAINTIFFS

v.

HAROLD BROWN, ET AL., DEFENDANTS

Civil Action No. 78-377

LUIS MEDINA, ET AL., PLAINTIFFS

v.

HAROLD BROWN, ET AL., DEFENDANTS

SUPPLEMENTAL COMPLAINT

TO THE HONORABLE COURT:

Come now plaintiffs in the above-captioned case and through their undersigned attorneys hereby supplement their Complaint by adding the following at the end of Paragraph 2:

More than sixty days have passed (1) since plaintiffs filed their Complaint and (2) since they notified, by means of, *inter alia*, their "Further Notice of Ongoing Violations," the Secretaries of Defense, the Navy, Interior and Commerce, the Administrator of the Environmental Protection Agency, the Regional Administrator for E.P.A. Region II, the Commandant of the Marine Corps, the Chief of Naval Operations and the Commander in Chief of the United States Atlantic Fleet that military operations on Vieques are in violation of the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1251, *et. seq.*; the Marine Protection Research and Sanctuaries Act, 33 U.S.C. § 1401, *et. seq.*, the Clean Air Act, as amended, 42 U.S.C. § 7401 *et. seq.*; the Noise Control Act, 42 U.S.C. § 4911, *et seq.*; the Resource Conservation and Recovery Act, 42 U.S.C. § 6091, *et seq.*; the

Endangered Species Act, 16 U.S.C. § 1540, *et seq.*; and regulations promulgated thereunder.

Respectfully submitted,

/s/ Miguel Gimenez Munoz
MIGUEL GIMENEZ MUNOZ
Secretary of Justice
Commonwealth of Puerto Rico
San Juan, Puerto Rico

/s/ Gerardo A. Carlo
GERARDO A. CARLO
Special Counsel to the Governor
Commonwealth of Puerto Rico
La Fortaleza
San Juan, Puerto Rico

/s/ John A. Hodges
JOHN A. HODGES
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036

/s/ Timothy L. Harker
TIMOTHY L. HARKER
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
Attorneys for Plaintiffs

PEABODY, RIVLIN, LAMBERT & MEYERS
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036

LEWIS A. RIVLIN
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
Of Counsel

JORGE L. CORDOVA, JR.
Office of the Commonwealth of Puerto Rico
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036
Of Counsel

Date: June 30, 1978.

EXCERPTS FROM PLAINTIFFS' PROPOSED FINDINGS OF FACT

Intensity of Navy Weapons Training on Vieques

11. Navy weapons fire against the land and waters of Vieques is intense. In 1977, in and around Vieques, the Navy:

a. dropped approximately five million pounds of ordnance (CRB Exh. 417, Answer to Interrogatory No. 23);

b. scheduled 1518 hours of air-to-ground training during which jet aircraft dropped 107,206 missiles and bombs and flew 3438 missions. Each mission involves multiple runs for each aircraft on and around the target. (CRB Exh. 417, Answer to Interrogatory No. 1.A);

c. scheduled approximately 1017 hours of NGFS training during which destroyers fired 8700 rounds of three-inch, five-inch and eight-inch ordnance (CRB Exh. 417, Answer to Interrogatory No. 1.B.);

d. scheduled approximately 40 hours of Marine artillery and amphibious training during which 225 artillery rounds were fired. Each amphibious operation involves multiple approaches and departures from the beaches of Vieques for each amphibious landing craft utilized. (CRB Exh. 417, Answer to Interrogatory No. 1.c.; Barr, Tr. 2802-03.)

12. The Navy has tremendously intensified the level of weapons firing against Vieques.

a. The Navy dropped approximately 922,000 pounds of ordance on or around Vieques in the last six months of 1973 and 3,886,000 pounds in the first six months of 1978. (CRB Exh. 417, Answer to Interrogatory No. 23.)

b. In 1970 the Navy fired against Vieques a total of approximately 35,000 missiles and bombs in air-to-ground training and approximately 1000 rounds in NGFS. (CRB Exh. 123.)

c. Between 1974 and 1977 the Navy increased by over 900 percent the number of 500 (MK82), 1,000 (MK83),

and 2,000 (MK84) pound bombs dropped on and around Vieques. (CRB Exh. 417, Answer to Interrogatory No. 25.b.)

d. Combined weapons training activity (training of NGFS and air-to-ground together) on Vieques increased from five hours in 1970 to 362 hours in 1977, while the level of combined training *decreased* on Culebra *from 1970 to 1975.* (CRB Exhs. 409 and 410.)

The Ordnance Fired at Vieques

13. The ordnance fired at Vieques are generally as follows:

a. Air-to-ground bombing and strafing uses live bombs generally of the following sizes: 2,000 pounds (945 lbs. TNT equivalent), 1,000 pounds (445 lbs. TNT equivalent), 500 pounds (192 lbs. TNT equivalent), and 250 pounds (100 lbs. TNT equivalent). Strafing and rocket fire utilize high explosive rockets and machine gun fire that the military considers "inert" ordnance. Air-to-ground bombing and strafing use other types of "inert" ordnance besides machine gun fire, some of which (*e.g.*, the 500 lb. "practice bomb") contains an explosive charge. (CRB Exh. 417, Answer to Interrogatory No. 23; Barr, Tr. 2877-78.)

• • • •

The Lack of Appropriate Safety and Environmental Restriction on the Manner in Which the Navy Bombards, Shells and Strafes Vieques.

15. The evidence shows lack of appropriate safety and environmental restriction on the manner in which the Navy bombards, shells and strafes Vieques:

a. Evidence abounds that the Navy frequently misses target areas causing great risk to safety and environmental destruction. (Findings *passim.*)[1] However, the Navy has no reliable knowledge of the frequency, range

or magnitude of its misses. In the brief period since the filing of this lawsuit plaintiffs were able to discover evidence of the following extraordinary misses.

1) On October 16, 1973 a Navy destroyer overshot the AIA sending a live projectile approximately six miles to the northeast of Vieques. That projectile landed in the vicinity of a private vessel. (Court's Exh. 6.)

2) In June 1976 a 2,500 pound missile misfired and landed near the town of Isabel Segunda. (CRB Exh. 154.) This missile possesses the speed range of 350 to 550 knots. (CRB Exh. 37; CRB Exh. 417, Interrogatory Answer 185; CRB Exh. 154; Barr, Tr. 2909-10.) The Navy defines this drone missile as being "inert" by virtue of the same criteria utilized to conclude that machine-gun bullets and certain other rockets, bombs and missiles fired at Viques are inert, *i.e.*, it allegedly does not contain an explosive warhead, although some "inert" ordinance do contain an explosive charge and other chemical composition. (CRB Exh. 417, Answer to Interrogatory No. 23 a.)

3) Admiral Kinnear testified that the miss potential for air-to-ground bombing is in terms of miles. (Kinnear, Tr. 3274-75.)

4) Former Range Commander Barr testified that NGFS shells and air-to-ground bombs are fired at Vieques that are "lost," *i.e.*, no one knows where they went. (Barr, Tr. 2956.) He testified that he is personally aware of a four-mile NGFS overshot. (Barr, Tr. 2957.)

5) Range Officer Lee testified that during air-to-ground bombing, bombs are also lost, *i.e.*, no one knows where they went. (Lee, Tr. 6392.) Lee also testified that during air-to-ground bombing, if, for example, one aircraft drops five or six bombs during one approach, if any *one* bomb hits the target area, the Navy scores the run as a "hit" even if the other bombs miss the target. During the October 18, 1978 site visit by the Court one

such incident was observed in which a bomb was dropped into the coastal waters but was not scored as "off-target" because *other* bombs dropped in that run on the target hit the target area. (Lee, Tr. 6392.)

6) The Navy admits that:

> "However, in view of the large amount of live ordnance dropped in the water in the Surface Danger Area surrounding eastern Vieques and the resultant amount of unexploded ordnance ending up on the ocean bottom, it should be considered paramount for safety that steps be taken to forbid at all times, diving, anchoring, botton. fishing and trapping within at least one mile of the Vieques coast inside the Surface Danger Area." (CRB Exh. 233, Encl. 1 p. 5.)

* * * *

Defendants Have Admitted Damaging Effects With Respect to The Reefs of Vieques.

114. Defendants have admitted that continued and expanded range use on Vieques "would cause a subtle and adverse impact to the total marine environment of these [Vieques] waters." (FAAH Exh. 15, p. 3-104.)

115. Defendants have also admitted the potential for a sediment problem with respect to a runoff of sediment from the impact area affecting the marine environment, including coral. Thus, they have admitted that the deeper slopes within the impact area are subject to erosion initiated by ordnance impacts. (FAAH Exh. 15, p. 3-89.) They then went on to admit that:

> "Surface runoff from these areas would tend to increase sediment-loading in the island's peripheral lagoons and other coastal waters with resultant environmental damage to aquatic marine ecology, *espe-*

cially the coral reef systems." (Emphasis added.) (*Id.*)

* * * *

"Continuous detonation of explosives above or below surface target areas will eventually cause pulverization of soil with resultant erosion from wind and surface waters. This would limit the restoration of growth in these areas. . . . Aerial and ship-to-shore bombardment of impact zones is usually accompanied by some ordnance falling long or short of the target areas. The potential adverse impact from this threatens damage to thalassia grass beds and mangrove zones. . . . Direct fish kills from the impact of stray ordnance may be expected, however, a more serious consequence is the long-term damage to aquatic life forms resulting from the explosive destruction of habitat, turbidity that reduces the photosynthesis in turtle grass zones and the sedimentation of live coral systems." (FAAH Exh. 15, p. 3-94.)

Defendants have also admitted that a transfer from Culebra to Vieques would result in *irreparable* damage to coral reefs. "Although much of the resulting ecological damage may be repaired by nature in time, *some damage to coastal zones, and reef systems in particular, is irreparable.*" (Emphasis added.) (FAAH Exh. 15, p. 3-115.)

116. Defendants' own maps and written materials admit specifically that reef and water areas around the eastern portion of Vieques are saturated with ordnance. For example, defendants admit in a map they prepared in 1978 that the northeast coast of Vieques, including its waters and reef areas from Punta Este to a point approximately half way between Puerto Diablo and Punta Goleta, is "saturated" with ordnance. (CRB Exh. 181, Appendix 1 hereto.) They also admit that the south coast of Vieques, including water and its reef areas from

Punta Este to a point in the ocean just east of Laguna Matias is "saturated" with ordnance. (*Id.*) This "saturated" area includes Roca Alcatraz and most of Cayo Conejo. In addition, in the same map defendants admit that ordnance might be present almost to Punta Goleta on the north and to the middle Ensenada Honda in the south. (CRB Exh. 181.)

117. Defendants admit that large areas within the "saturated" areas mentioned above are "super-saturated" with ordnance. During the April 10, 1978 hearing before this court, defendants introduced a map, which indicated 10 areas marked "A," "B," "C," "D," "E," "F," "G," "H," "I" and "J". (Exh. 1, at April 10, 1978, hearing (hereafter "April 10 Exh. 1") (Appendix 2 hereto); see transcript of April 10, 1978 hearing (hereinafter "April 10 Tr. at 113-151.) This exhibit was sponsored by the defendants with extensive supporting testimony. Defendants specifically characterized these as "super-saturated." (April 10 Tr. 118-119.) These 10 areas include and/or border on important coral reefs on the eastern end as depicted on April 10 Exh. 1. Each area is discussed below:

a. Supersaturated *Area "A"* is a trapezoidal area that covers most of Bahia, Salina del Sur, including reefs on its eastern portion. Area "A" extends out to Roca Alcatraz. (April 10 Exh. 1; April 10 Tr. 124-125.) As stated by a Navy witness during examination with respect to Area "A:"

> "Q. Why is such a large area covered in A as being extremely dangerous?
>
> A. *What we have gone by on here is our previous experiences and observations in the past along with A, as we have been in that area, and it was saturated with 2,000 pound bombs and 15,000 pound bombs.*
>
> *I am sorry—1,000 pound bombs the last time I was there.*

Q. *And that includes all the way up to [R]oca Alcatraz?*

A. *That is correct.*" (Emphasis added.) (April 10 Tr. 134-135.)

b. Supersaturated *Area "B"* extends from the fore-reef edge of the reef at Punta Icacos, thence west to the northern portion of Puerto Diablo, including reefs at Puerto Diablo as depicted on defendants' exhibit. (April 10 Exh. 1; April 10 Tr. 130-131.)

c. Supersaturated *Area "C"* covers almost the entire Bahia Icacos and includes Isla Yallis. It includes portion of or touches on three reef areas as depicted on the defendants' exhibit. The Navy witness indicated specifically that ordnance covers "the entire area C." (April 10 Exh. 1; April 10 Tr. 135.)

d. Supersaturated *Area "D"* covers Laguna Anones as well as land areas and a portion of Bahia Salina del Sur near its northeastern shore. (April 10 Exh. 1.)

e. Supersaturated *Area "E"* includes Bahia Salinas on the north of Vieques. It includes or touches three reef areas as depicted on the defendants' exhibit. (April 10 Exh. 1; April 10 Tr. 136.)

f. Supersaturated *Area "F"* is on land just to the east of Laguna Anones. (April 10 Exh. 1; April 10 Tr. 136.)

g. Supersaturated *Area "G"* borders Area "A" in and includes a portion of Bahia Salina del Sur that contains a reef as depicted on defendants' exhibit. (April 10 Exh. 1; April 10 Tr. 137-138.)

h. Supersaturated *Area "H"* is on land to the east of Laguna Anones. (April 10 Exh. 1; April 10 Tr. 138.)

i. Supersaturated *Area "I"* is on land near Penasco Fosil and borders the reef there as depicted on defendants' exhibit. (April 10 Exh. 1; April 10 Tr. 138-139.)

j. Supersaturated *Area "J"* touches a reef just to the east of Punta Salinas, includes another reef farther to the east, and borders another reef somewhat farther to the east. (April 10 Exh. 1; April 10 Tr. 138-139.)

118. Additional documents prepared by defendants indicate the presence of ordnance all the way to south of Cayo Conejo. (See CRB Exh. 212, ¶ 12; CRB Exh. 232; CRB Exh. 233, Encl. 1, p. 5; Finding 15(a)(6).)

* * * *

Evidence Introduced at Trial Confirms the Existence of Military Damage to The Reefs of Vieques.

120. Items discovered in the waters of Vieques near the reefs include metal fragments of airborne bombs, artillery shells, practice ordnance, parachutes, parachute cables, flares, flaring casings, barges and other military vessels, machine gun rounds, bazooka rockets and many unidentifiable ordnance fragments. (*See, e.g.*, G. Cintron, Tr. 1782-1786, 1805-1808, 1813, 1817, 1819-1820, 1830, 1954; CRB Exhs. 312, 313 (large caliber machine gun rounds), 314 (metal).)

121. Mr. Cintron described some of the kinds of damage caused by such military activities on Vieques:

a. Shells that detonate in the vicinity of the reef cause shearing and cleavage of coral structures, thereby exposing the internal structure of the coral to predatory organisms. (G. Cintron, Tr. 1786-1787, 1794, 1795, 1807, 1941.) Damage to corals, for example, opens the way to the growth of blue-green algae, which has concerned many scientists because of a possible link to ciguatera, a type of fish poisoning. (G. Cintron, Tr. 1795.) Two species of coral found off of Vieques, acropora palmata and the columbus lobate form of montastrea annularis, are especially susceptible to damage from blasting, which tends to split the coral open. (Acropora plays an important role in providing shelter for turtles and fish. (G. Cintron, Tr. 1787.)) Colonies of these two species of coral have sustained widespread damage in areas that are very sheltered and not subject to wave motion. (G. Cintron, Tr. 1787, 1822.) The blasting also loosens coral, making them susceptible to toppling from movement of the water. (G. Cintron, Tr. 1783.)

b. Metal fragments that strike a reef cause both mechanical breakage and abrasions on the living skin of coral. Abrasions, by cutting the surface of the coral, increase its vulnerability to infections. Military debris and coral fragments broken off the reef can be moved by a swell and cause further damage to adjacent colonies. This has occurred on Vieques reefs. (G. Cintron, Tr. 1789, 1791, 1793, 1831, 1941-1950.)

c. Ordnance, military hardware and other heavy debris striking the ocean floor or detonating in the vicinity of a reef puts sediments into suspension, which are then transported by the current and deposited on nearby reefs. Sediment from blasting which is deposited on coral colonies tends to stay there, due to the slightly concave shape of the colonies. Sedimentation damages or kills living coral. A number of reefs off Vieques bear evidence of sedimentation damage. (G. Cintron, Tr. 1794, 1799, 1809, 1969.)

d. Shell fragments and other military debris that come to rest on the surface of a coral reef cause the death of underlying coral tissues by shading the coral from necessary sunlight and by impeding feeding mechanisms. Such dead areas are sites for infection. (G. Cintron, Tr. 1787-1793.)

e. The waters surrounding Vieques contain parachutes and shreds of parachute. (G. Cintron, Tr. 1784-1785; 1954, CRB Exh. 351) Parachutes that fall into the water and come to rest draped over coral colonies cause the death of all underlying coral tissues. (G. Cintron, Tr. 1792, 1821.)

122. Photographic evidence and accompanying testimony corroborates the existence of damage in the coral areas of Vieques. See, *e.g.*, CRB Exhs. 310(58), 310 (56), 310(57), 310(6); G. Cintron, Tr. 1802-1804 (highly disturbed reef areas in the north shore area, with bomb fragments); CRB Exh. 310(51), G. Cintron, Tr. 1805-1806 (recently-dropped drag fin in barrier reef in Bahia Salina del Sur; drag fins are "exceedingly com-

mon" in Bahia Salina del Sur); CRB Exh. 310(52), G. Cintron, Tr. 1806-1808 (area near Roca Alcatraz containing large circular holes in acropora palmata framework, sometimes more than 20 meters in diameter; aircraft-delivered object visible near large crater; "extensive" damage to reef); CRB Exhs. 310(30), 310(25), G. Cintron, Tr. 1808-1809 (drag fin in very disturbed barrier reef area in Bahia Salina del Sur); CRB Exh. 310(27), G. Cintron, Tr. 1809-1811 (large metal fragment in Bahia Salina del Sur; sediment damage); CRB Exh. 310(53), G. Cintron, Tr. 1812-1813 (ordnance [perhaps flare casing] in acropora palmata area); CRB Exhs. 310(31), 310(33), G. Cintron, Tr. 1813-1814 (flare casings and cables formerly attached to parachutes in coral areas); CRB Exhs. 310(50), 310(49), G. Cintron, Tr. 1814-1815 (metallic object, larger than a human being, resting on coral southwest of Roca Alcatraz); CRB Exhs. 310(19), 310(9), G. Cintron, Tr. 1816 (large piece of ordnance in reef in Bahia Salinas in north coast of Vieques; coral damage visible); CRB Exhs. 310(11), 310(4), G. Cintron Tr. 1816-1817 (large piece of ordnance in acropora palmata coral in Bahia Salinas in north coast of Vieques); CRB Exh. 310(44), G. Cintron, Tr. 1817 (round of "artillery" ordnance at reef near Punta Gato); CRB Exhs. 310(55), 310(54), G. Cintron, Tr. 1817-1818 (cratered reef area near Roca Alcatraz, large metal objects near craters); CRB Exh. 310(8), G. Cintron, Tr. 1819 ("artillery" shell lodged in reef crevice); CRB Exh. 310(20), G. Cintron, Tr. 1819-1820 (inert ordnance on reef off Punta Gato); CRB Exh. 310(29), G. Cintron, Tr. 1820 ("artillery" round in highly disturbed site near or at barrier reef on south coast of Bahia Salina del Sur); CRB Exhs. 310(47), 310(48), G. Cintron, Tr. 1820-1821 (parachutes draped around coral colonies thus killing the coral); CRB Exh. 310(3), G. Cintron, Tr. 1822 (effects of probable direct hit on massive colonies of monastrea annularis; coral colony split; pieces have lost their orientation and are ly-

ing on their side); CRB Exh. 310(45), G. Cintron, Tr. 1822-1823 (large colony of montastrea annularis cleaved by a blast); CRB Exh. 310(2), G. Cintron, Tr. 1823-1824 (crater off patch reef at Bahia Salinas in north of Vieques); CRB Exh. 310(42), G. Cintron, Tr. 1824-1825 (crack in reef framework); CRB Exh. 310(10), G. Cintron, Tr. 1826-1827 (coral rubble, including sheared coral blades); CRB Exh. 310(62), G. Cintron, Tr. 1828 (craters off northeast flank of Roca Alcatraz); CRB Exh. 310(61), G. Cintron, Tr. 1828 (sedimentation and coral rubble in barrier reef in Bahia Salina del Sur); CRB Exh. 310(22), G. Cintron, Tr. 1830 (living coral cover stripped from patch reef in north coast of Bahia Salinas; reef framework full of large cracks, rocks loose, metal fragment visible); CRB Exh. 310(14), G. Cintron, Tr. 1830-1831 (disturbed colony of montastrea annularis at barrier reef in Bahia Salina del Sur); CRB Exh. 310(15), G. Cintron, Tr. 1831 (large pieces of dislodged montastrea annularis in barrier reef in Bahia Salina del Sur); CRB Exh. 310(28), G. Cintron Tr. 1831 (dislodged colony of montrastrea annularis, more than 10 feet across); CRB Exh. 310(32), G. Cintron, Tr. 1831-1832 (metal fragment on top of colony of montastrea annularis); CRB Exh. 310(46), G. Cintron, Tr. 1832 (dead coral tissue and rust spots on coral tissue caused by metal fragment); CRB Exh. 310(13), G. Cintron, Tr. 1832 (large circular piece of metal lodged in large colony of montastrea annularis in Bahia Salina del Sur; abrasion to coral seen near metal object); CRB Exh. 310(12), G. Cintron, Tr. 1832-1833 (metal piece on coral in Bahia Salina del Sur with recently abraded, dead coral nearby); CRB Exh. 310(46), G. Cintron, Tr. 1833 (crater being filled with debris near base of reef in patch reef in Bahia Salinas in north of Vieques); CRB Exh. 310(42), G. Cintron, Tr. 1834 (sedimented coral head at base of reef in Bahia Salinas in north of Vieques); CRB Exh. 310(43), G. Cintron, Tr. 1835 (ordnance that defendants planned to blow up intention-

ally on coral reef near Isla Yallis on June 7, 1978 as part of their trial preparation); CRB Exh. 327(14), G. Clinton, Tr. 1851-1852 (holes in fringing reefs off Punta Gato); CRB Exh. 327(11), G. Cintron, Tr. 1853 (cratering in barrier reef in Bahia Salina del Sur); CRB Exh. 327(12), G. Cintron, Tr. 1853 (cratering in Bahia Salina del Sur); CRB Exh. 327(3), G. Cintron, Tr. 1854 (barge sunk at Roca Alcatraz; craters visible on reef slope); CRB Exh. 327(8), G. Cintron, Tr. 1854, 1855 (disturbed area with holes in area where there are large metal fragments); CRB Exh. 327(10), G. Cintron, Tr. 1854 (disturbed seagrass bed in proximity to patch reef off Punta Gato); see also CRB Exh. 336, G. Cintron, Tr. 1856-1860 (locations of certain damage found by plaintiffs during limited inspection of certain reef areas of Vieques).

* * * *

131. Defendants' other coral reef witness Raymond made several admissions about the deleterious effect Navy activities have with respect to the Vieques coral reefs. For example:

> (1) *"Periodic bombing and bulldozing in the Atlantic Fleet Weapons Range has removed a major portion of the vegetation in the eastern half of the drainage basin of Bahia Salina del Sur, undoubtedly increasing the erosion and deposition of sediments into Laguna Anones. The result has been that Laguna Anones is now a dry lagoon with standing water only in bomb craters, causing increased runoff of terrigenous sediments into Bahia Salina del Sur at the northeast corner of the bay. Evidence exists of recent channelling of sediment through a narrow gap through the beach during heavy rainfall."* (Emphasis added.) (Def. Exh. 83, pp. 33-34; Raymond, Tr. 6132.)
>
> (2) *"The fringing reefs on both sides of the north central cove in Bahia Salina del Sur have been ex-*

tensively bombed. Several craters in the reefs are visible in recent color aerial photos (flown August 1978 by the U. S. Navy)." (Emphasis added.) (Def. Exh. 83, p. 35; Raymond, Tr. 6134.)

(3) ". . . *The effect of occasional shortfalls and overfalls of bombs and projectiles on the marine environment is a subject of major concern to this investigation, from a sedimentologist's perspective. Close examination of several bomb craters up to 10 meters in diameter along the north coast of Punta Gato has revealed extensive sediment damage from explosions around the perimeters of the craters. The craters themselves have become partly filled with sand.*" (Emphasis added.) (Def. Exh. 83, pp. 33-35; Raymond, Tr. 6132-6133.)

132. Raymond acknowledged the existence of sediment on corals in Vieques. (Raymond, Tr. 6071; Def. Exhs. 82A (sediment on reef S-4 in Bahia Salina del Sur), 82B (sediment in reef S-4); Raymond Tr. 6082; Def. Exh. 82(1-3) (transects A-B); Def. Exh. 83, p. 12.) In addition, he admitted that sediment damage to Vieques coral has been a relatively *recent* occurrence:

* * * *

Defendants' Military Activities Damage Seagrass Communities on Vieques.

136. Defendants' military operations are damaging seagrass communities of Vieques.

137. Defendants have admitted harm and potential harm to seagrass and other aspects of the marine ecosystem on and around Vieques caused by their military operations:

"Continuous detonation of explosives above or below surface target areas will eventually cause pulverization of soil with resultant erosion from wind and surface waters. . . . This would limit the restoration of growth in these areas. Aerial and ship-to-shore

bombardment of impact zones is usually accompanied by some ordnance falling long or short of the target areas. *The potential adverse impact from this threatens damage to thalassia grass beds* and mangrove zones. Direct fish kills from the impact of stray ordnance may be expected, *however, a more serious consequence is the long-term damage to aquatic life forms resulting from the explosive destruction of habitat, turbidity that reduces the photosynthesis in turtle grass zones* and the sedimentation of live coral systems." (Emphasis added.) (FAAH Exh. 15, p. 3-94.)

138. Defendants' expert Joseph Zieman stated that there is "no question" that the naval activities on Vieques have had an impact on the seagrass communities. The craters in the seagrass beds are the evidence of this fact. (Def. Exh. 95 [Zieman Report], pp. 42-43.) The explosion of a bomb in and above seagrass beds physically removes the grass. (Zieman, Tr. 6643-6644.) In addition, when a bomb hits, sediment is thrown out, the rhizome system is destroyed or completely removed. (Zieman, Tr. 6630-6631.) Zieman noted circular holes in the seagrass beds, best illustrated, he said, north of Punta Gato where the sediment was ripped up and torn out as if "someone had taken a giant cookie cutter and removed the center of the bed and there was the hole." (Def. Exh. 95, pp. 42-43; Zieman Tr. 6650.) Zieman also testified that there has been considerable bombing damage in the marine bottom in the eastern part of Bahia Salina del Sur. (Zieman, Tr. 6651.) Zieman acknowledged that the number of craters have increased in the Punta Gato area since 1972. (Def. Exh. 95, p. 44; Zieman, Tr. 6682, 6687.) It is Zieman's opinion that there has been an increase in bombing damage right off the mock runway. (Zieman, Tr. 6688; see also CRB Exhs. 355-A, 355-B, 355-C; Jimenez, Tr. 4054-4056.)

139. Other evidence confirms the existence of damage to the seagrass beds. Plaintiffs' witness Vance Vicente confirmed that there are numerous circular disrupted

zones or craters within the thalassia beds on both Bahia Salina del Sur and Bahia Icacos. (Vicente, Tr. 2063.) From aerial photography it is apparent that the number of craters in the seagrass plateau at Punta Gato have at least tripled from 1972 to 1978 (an increase from 5 in 1972 to 15 in 1978). (CRB Exhs. 316, 317; Vicente, Tr. 2065, 2067-2072.) Additional holes may not be apparent since some holes can serve as traps for seagrass, detritus and algae and thus may not show up clearly in aerial photographs. (CRB Exh. 316, 317; Vicente, Tr. 2067-2068, 2072.)

140. There is sediment disturbance in Bahia Icacos and Punta Gato. This seriously damages seagrass beds because disturbance of sediment changes not only the physical, but also the chemical, properties affecting seagrasses. (Vicente, Tr. 2118.) This type of sediment disturbance can deteriorate into "blow-outs," therefore making these seagrass beds prone to erosion. (Vicente, Tr. 2063; 2083-2086.) In addition to the present damage that these craters represent, the occurrence of a severe storm or an extreme high wave energy period could cause damage to the plateau by erosion. (Vicente, Tr. 2085-2086.) These disrupted cratered areas are expected to have a long-lasting effect on seagrass communities and the marine environment generally, since thalassia rhizomes do not propagate rapidly. (Vicente, Tr. 2063-2064.)

141. An additional problem caused by the destruction of seagrasses around Vieques is that highly nutritive seagrass such as thalassia are being replaced by calcareous green algae such as halimeda, which have almost no nutritive value and which are not as good sediment stabilizers as seagrasses. (Vicente, Tr. 2063, 2103-2104; Zieman, Tr. 6630-6631.)

142. The growth of seagrass is impaired by run-off from the land caused by defendants' bombing. Inland vegetation stabilizes the soil and the sediment in land. When the vegetation is removed, the soil becomes de-

stabilized. Periods of rain and wind transport sediment into the water column causing an increase in turbidity. This increased turbidity diminishes light penetration in the water column which, in turn, limits the depth to which seagrasses can grow. (Vicente, Tr. 2083.)

143. Photographic evidence and accompanying testimony bears out the existence of damage to seagrass areas. See, *e.g.*, CRB Exh. 319(1), Vicente, Tr. 2099 (ordnance found in in Bahia Salina del Sur, causing sediment disruption); CRB Exh. 319(3), Vicente, Tr. 2099 (results of ordnance firing); CRB Exh. 319(5), Vicente, Tr. 2100-2101 (piece of ordnance at in Punta Gato, which has penetrated into the sediment and caused sediment disruption around it on the seagrass plateau); CRB Exh. 319(7), Vicente, Tr. 2101 (crater in Bahia Icacos showing sediment disruption); CRB Exh. 319(9), Vicente, Tr. 2102 (metal fragment found at crater in seagrass bed in Punta Gato, causing large sediment disruption); CRB Exh. 319(12), Vicente, Tr. 2103 (crater at Punta Gato; rolled up leaves of seagrasses, principally thalassia inside crater; vegetation surrounding this crater is a calcareous green algae); CRB Exh. 319(13), Vicente, Tr. 2104 (edge of crater showing exposed rhizomes); CRB Exhs. 319(14), 319(15), Vicente, Tr. 2106 (bombs at Punta Gato, causing disruption of substrate; principal vegetation is calcareous algae); CRB Exh. 319(16), Vicente Tr. 2106-2107 (crater in Punta Gato with a bomb lying over thalassia bed; calcareous green algae evident); CRB Exh. 310(46), Vicente, Tr. 2108-2110 (craters on north coast of Vieques; existence of rolled up leaves tends to make crater less visible from aerial photography); CRB Exh. 325, Vicente, Tr. 2109-2110 (craters and substantial sediment disruption); CRB Exh. 310(20), Vicente, Tr. 2110 (bomb lying on marginal zone that divides crater from seagrass bed plateau); CRB Exh. 320(7), Jimenez, Tr. 2113 (metal fragment found under leaves on the seagrass bed pleateau at Punta Gato); CRB Exh. 320(4); Vicente, Tr. 2118

(shell fragment); CRB Exh. 323(1); Vicente, Tr. 2119-2120 (three to four coral patches on the western side of Bahia Icacos, covered by algae detritus [brown algae and calcareous green algae] instead of coral); CRB Exh. 323(2), Vicente, Tr. 2120-2121 (coral patch in the eastern point of Punta Gato; dead thalassia rhizomes); CRB Exh. 323(3), Vicente, Tr. 2121 (Mortar shell in Bahia Salina del Sur); CRB Exh. 323(4), Vicente, Tr. 2122-2123 (dead coral rubble in Bahia Salina del Sur); CRB Exh. 323(5), Vicente, Tr. 2124 (ordnance found commonly in Bahia Salina del Sur); CRB Exh. 323(6A), Vicente, Tr. 2124-2125 (mortar shell in Bahia Salina del Sur); CRB Exh. 323(6B), Vicente, Tr. 2125 (luminous flare covered with fine sediment); CRB Exhs. 318(1A), 318(B), 318(C); Vicente, Tr. 2126-2127 (common ordnance, including 500 lb. bomb, found at Punta Gato); CRB Exh. 318(2), Vicente, Tr. 2129 (ordnance at Punta Gato and Bahia Icacos); CRB Exhs. 329(1), 329(2), 329(3), Vicente, Tr. 2130 (craters, dead thalassia leaves trapped in craters, and large amount of calcareous green algae surrounding craters).

The Evidence Indicates that the Disturbance on the East End of Vieques is Reducing Fish Populations There

144. The disturbance on Vieques has adversely affected fish populations in its seagrass beds. Dr. Zieman collected fish from the seagrass beds on the east end of Vieques and compared this information with data collected from Tague Bay on the east end of St. Croix. Dr. Zieman believes that Tague Bay serves as a reasonable comparison for the fish data from Vieques. Grassbeds fish were sampled at each of the stations where seagrass production was measured. Dr. Zieman found as follows: twenty-five species collected in Vieques and 35 at St. Croix; and total fish numbers are "vastly different" in Vieques and St. Croix. (Def. Exh. 95, p. 34.) Species diversities are generally lower for samples col-

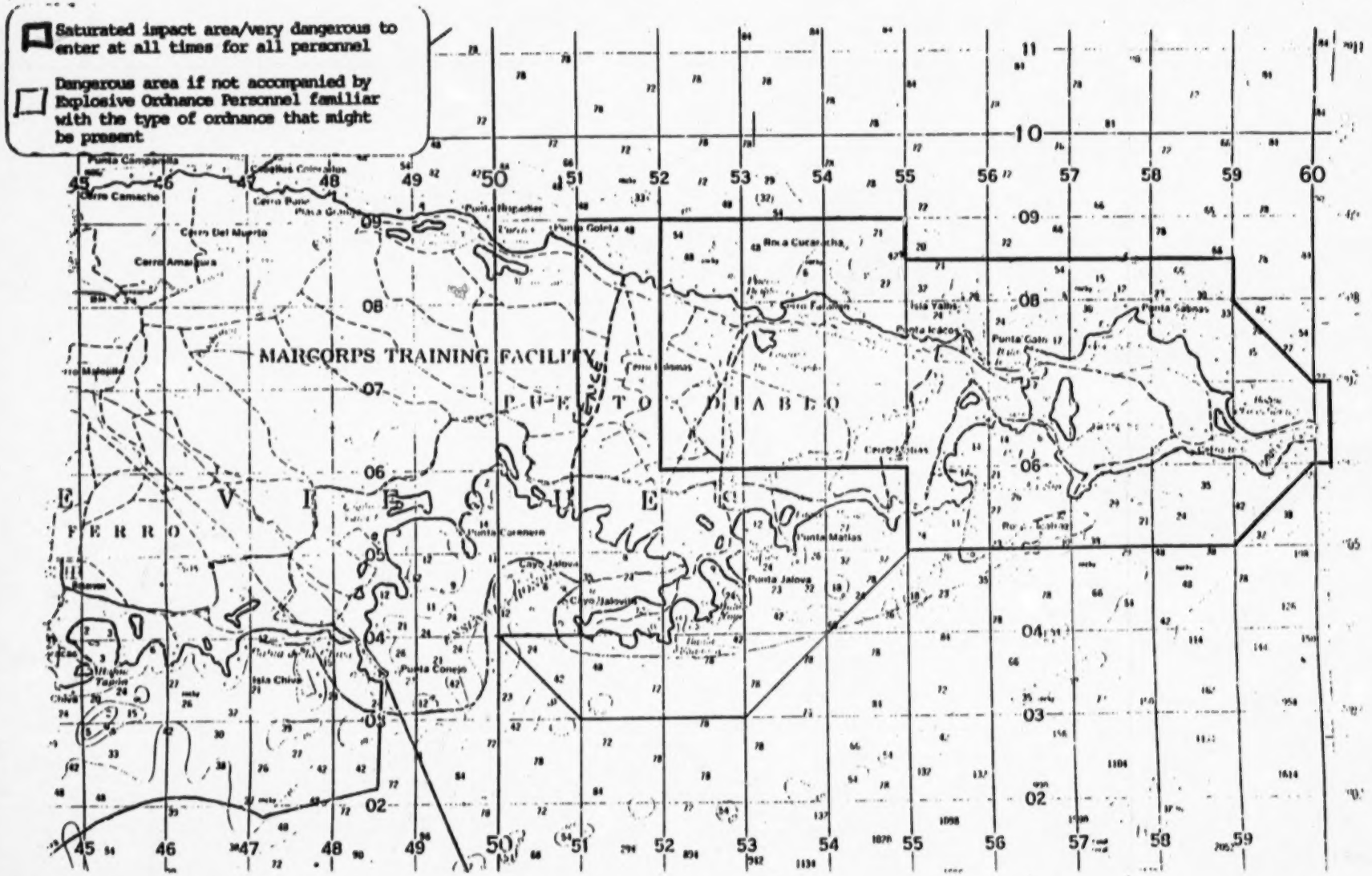
lected in Vieques grassbeds than those determined for Tague Bay grass communities, and total numbers of fish are "much lower" in Vieques when compared to similar data from Tague Bay. (*Id.*, p. 39.) Also the mean values for Vieques at 8.6 percent of daily production of seagrass grazed are lower than the grazing rate at St. Croix of 14.2 percent; this lower grazing rate corresponds strongly to the reduced numbers of grassbed fish in Vieques. (*Id.*, p. 40.) Dr. Zieman acknowledged that losses with respect to fisheries resources resulting from losses of seagrass beds can be considerable. (Zieman, Tr. 6668.) His data gathered on Vieques and St. Croix confirms this.

It Will Take a Considerable Amount of Time for the Damaged Seagrass on Vieques to Recover, If They Recover at All; Continued Bombing and Shelling Means Continued Stress and the Risk of a "Collapse" of Seagrass Areas.

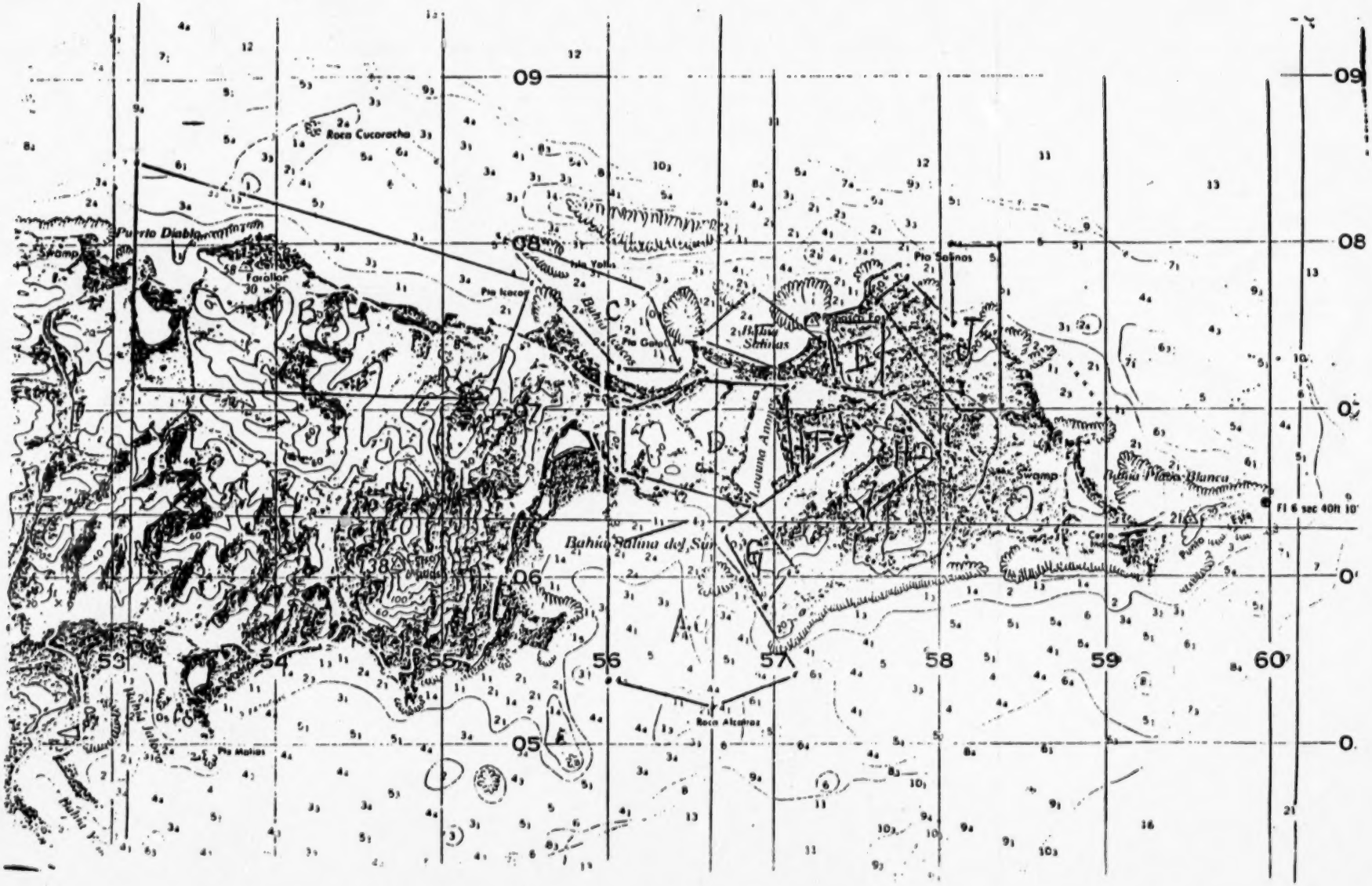
145. If disturbed or destroyed, seagrass will take a long time to recover. (Zieman, Tr. 6669). While Dr. Zieman indicated that seagrass beds can recover, "the process sometimes takes considerable time. . . [T]he damaged areas must first sediment in. Sediment must return to the area and then certain chemical processes must take place to enable the rhizomes to grow back into the region." (Zieman, Tr. 6644.) Thalassia has not recolonized many of its former areas in southern Florida and in the Caribbean even 50 years after it has been removed. (Vicente, Tr. 2065; Zieman, Tr. 6662.) Many areas of thalassia have not recovered after many years following dredging operations. (Zieman, Tr. 6668.) In one experiment, thalassia beds denuded of leaves and rhizomes were not subsequently recolonized. (Vicente, Tr. 2064.) Tracks resulting from propellers have persisted for 2-5 years. (Vicente, Tr. 2064-2065.) Shot holes in seagrass beds in British Honduras, caused by oil explosives, could still be seen in aerial photographs after

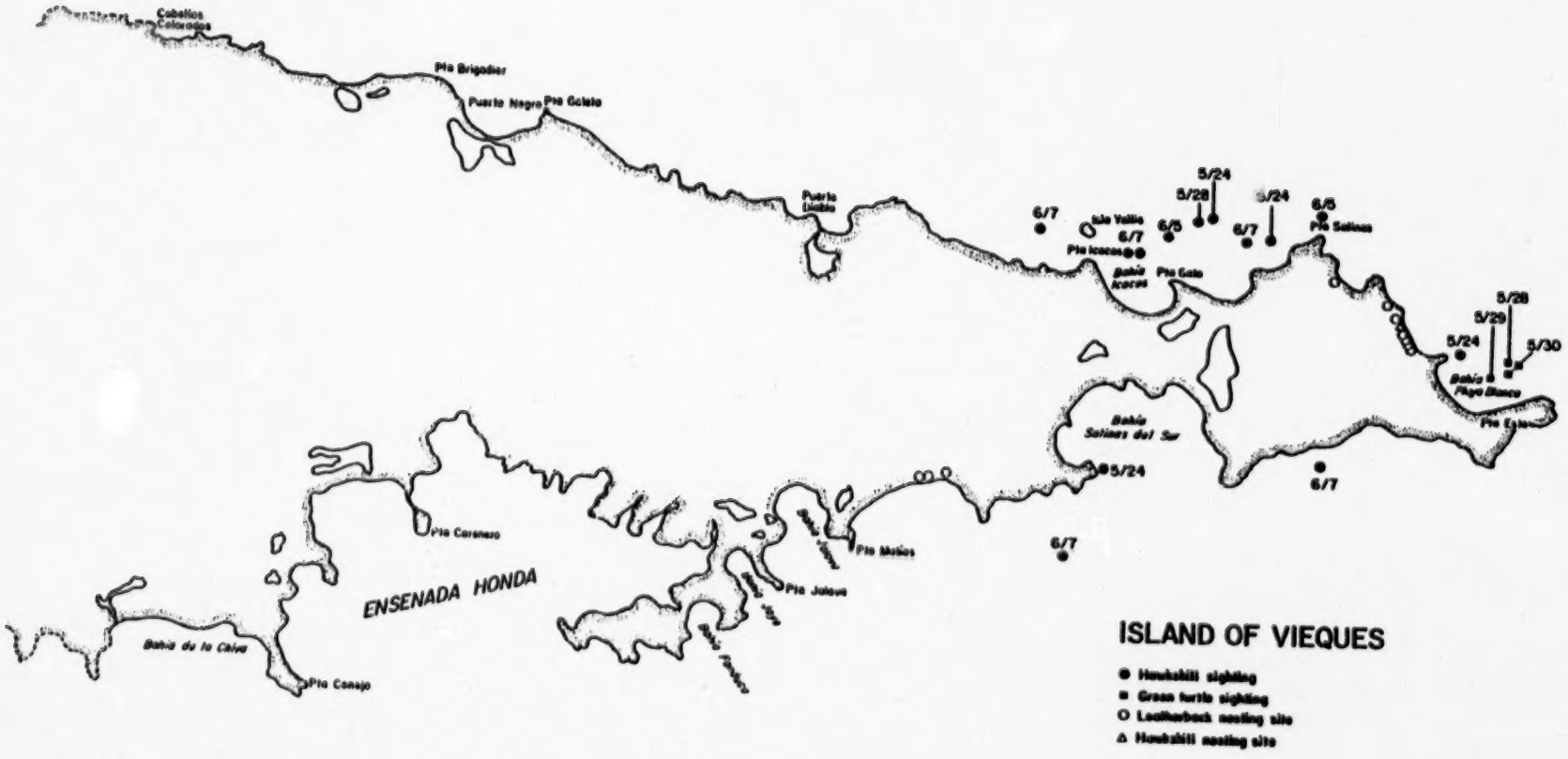
10-15 years; they were colonized by calcareous green algae. (Vicente, Tr. 2064.) According to Zieman, the best estimates at this time indicate that at minimum, two years are normally required for recolonization even to commence. According to Zieman, in some instances, recolonization has not occurred for 17 years after discrete, identifiable disturbances. Zieman said that the eastern part of Bahia Salina del Sur could take 10 years or longer to recolonize and Punta Gato would normally need 4-6 years (Zieman, Tr. 6680), *assuming no further disturbance.* (Zieman, Tr. 6681.)

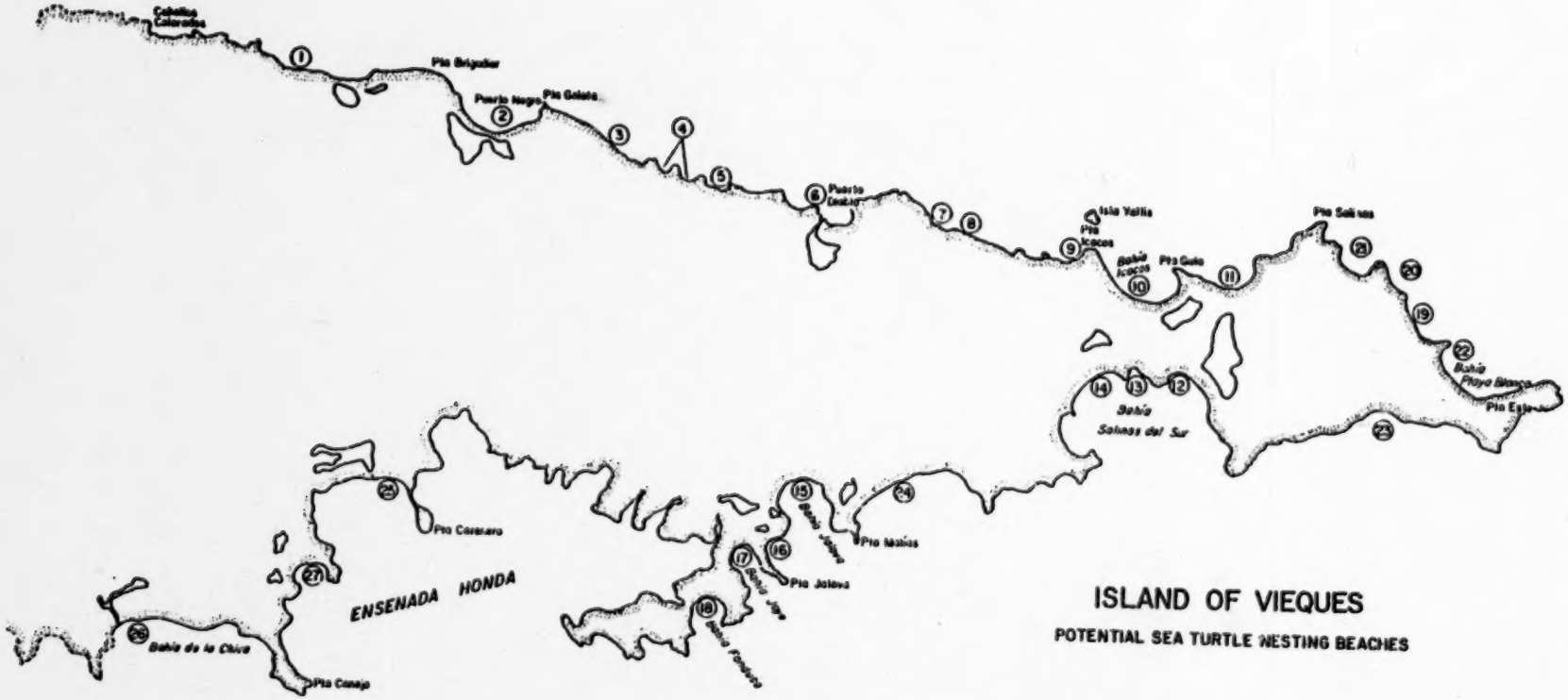
146. According to Zieman, at the slow recovery rate of seagrass, cessation of the bombing at Vieques would be the best and quickest way to ensure recovery of the Vieques seagrass. (Zieman, Tr. 6681.) A continuation at the present level of bombing would mean a continued stress on the community. (Zieman, Tr. 6681.) Any system can take only a certain amount of stress before a collapse occurs, he said. For systems such as seagrass beds, he said, the level required to induce this collapse is not known except for very few stresses, such as thermal pollution. He concluded that the seagrass meadows on Vieques can be productive and functioning areas only if the stress is curtailed by changes with respect to military activity there. (Def. Exh. 95, p. 44.)


Saturated ispact area/very dangerous to enter at all times for all personnel
Dangerous area if not accompanied by Explosive Ordnance Personnel familiar with the type of ordnance that might be present
MARCORPS TRAINING FACILITY
PUERTO DIABLO
VIEQUES
FERRO
Punta Campanilla
Cerro Camacho
Cerro Puro
Punta Ripartee
Punta Golota
Cerro Del Muerto
Cerro Amargura
Punta Conejo
Punta Jalova
Punta Matias
Punta Icacos
Punta Salinas
Isla Chivo
Isla Yabia
45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60
02 03 04 05 06 07 08 09 10 11

APPENDIX 2


09
08
07
06
05
53
54
55
56
57
58
59
60
Roca Cucaracha
Puerto Diablo
Swamp
Farallon
Pto Yallos
Pto Kacos
Pto Galeta
Bahia Salinas
Pto Salinas
Laguna Ammos
Bahia Salina del Sur
Bahia Playa Blanca
Roca Alcatraz
Pto Matos
Fl 6 sec 40ft 10


Cabellos Colorados
Pta Brigadier
Puerto Negro
Pta Golata
Puerto Diablo
Bahía Icacos
Pta Icacos
Pta Gata
Pta Salinas
Bahía Playa Blanca
Pta Este
Bahía Salinas del Sur
Pta Carenero
ENSENADA HONDA
Bahía de la Chiva
Pta Conejo
Pta Mulas
Pta Juluca
5/24
5/28
5/29
5/30
6/5
6/7
ISLAND OF VIEQUES
● Hawksbill sighting
■ Green turtle sighting
O Leatherback nesting site
△ Hawksbill nesting site



ISLAND OF VIEQUES

POTENTIAL SEA TURTLE NESTING BEACHES

EXCERPTS FROM PLAINTIFFS' POST-TRIAL BRIEF

* * * *

(8) In June 1974 the President ordered the Navy to terminate its weapons training on Culebra and ordered that a transfer of that activity to another site, if that site were in Puerto Rico, was contingent on its being acceptable to the Government of Puerto Rico. (CRB Exh. 116.)

The Navy's systematic, unilateral transfer of Culebra weapons training activity to Vieques from 1971 through 1975, thus violated the mandate of Congress, the Agreement between the Navy and the Government of Puerto Rico, and the orders of the Secretary of Defense and of the President.

C. *The Navy Transferred Culebra Training Activity To Vieques.*

In 1970 the air-to-ground and ship-to-shore Naval Gunfire Support ("NGFS") training conducted by the Navy in the Atlantic Fleet Weapons Range was almost entirely aimed at targets on Culebra. Vieques was principally used for artillery training and other maneuvers by the United States Marine Corps. In comparison to the levels of Navy training conducted on Culebra, Vieques was little used.[2]

This fact is supported by the 1970 testimony of the Secretary of the Navy before Congress that,

> "Ninety percent of all ship-to-shore gunfire support training for the entire Atlantic Fleet is done on the northwest peninsula of Culebra. Eighty percent of

---

[2] The evidence does not substantiate any possible argument that Vieques in any prior year was utilized for military training nearly as intensively as it has been in the past few years since the transfer of Culebra training. (CRB Exhs. 123, 417; Answer to CRB Interrogatories No. 1 and 95.)

> the air-to-ground training at the Atlantic Fleet Weapons Range is done on the rocks and cays to the east and west of Culebra." (CRB Exh. 25, p. 3; CRB Exh. 26, pp. 300, 303-304; CRB Exh. 24, at unnumbered p. 7).

That Vieques was primarily a Marine training ground in 1970 is corroborated by the testimony before this Court of Dr. Harald Leuba, a former Defense Department systems analyst who directed a major study ("1971 Study") for the Secretary of Defense on Navy training operations in Culebra and Vieques.[3] Dr. Leuba testified that,

---

[3] Dr. Leuba's testimony is also based on an extensive systems analysis of the Navy's *own* data on the levels of weapons training conducted by the Navy on Culebra and Vieques and on his own expert knowledge of those training operations. (Leuba, Tr. 65, 74, 78-79) The Navy produced voluminous data on the number of rounds fired, the number of ships operating, the number of aircraft sorties (missions) flown, and the number of hours of weapons training activity on Culebra and Vieques. (Leuba, Tr. 54-158; CRB Exh. 123) This data was produced by the Navy in response to plaintiffs' Motion for Leave to Take Depositions, filed on March 6, 1978. It shows that since 1971 Navy ship-to-shore and air-to-ground shelling and bombing on Vieques have dramatically increased. (CRB Exhs. 123, 417 [Answer to Interrogatories Nos. 1, 23, 25, 27, 85.]; CRB Exhs. 409, 410.)

Dr. Leuba's analysis of training levels in Culebra and Vieques was conducted to determine whether or not the Navy had transferred training from Culebra to Vieques. (Leuba, Tr. 53-55, 64.) Dr. Leuba, as an *added* precaution to assure accuracy in his analysis and conclusions, compared the Navy data on levels of training in Culebra and Vieques with the overall trends since 1970 in Navy manpower (CRB Exhs. 123, 65-66, 68.) Based on this analysis and on his own expert knowledge of the training conducted by the Navy's Atlantic Fleet, Dr. Leuba concluded that since 1971 the level of Navy ship-to-shore and air-to-ground activity on Vieques had increased due to the transfer of Culebra operations since that date. Dr. Leuba used Navy manpower levels as an indicator of the overall drop in Navy training while training in Vieques increased.

This makes his conclusion of a transfer from Culebra to Vieques a very cautious and reliable one because, as he testified, overall

"Q. Now, do I understand it from your testimony that each island was rather sort of an autonomous unit within that complex and each one had ascribed to that autonomous perimeter of land, a certain and determined type of naval exercise which was mutually excluded from the other?

A. That was very nearly exactly the case." (Leuba, Tr. 116.)

Dr. Leuba testified that the two ranges were not used interchangeably. He testified:

"[B]y and large there was a clear demarcation on the use of the two facilities. Culebra ship-to-shore and Vieques for the Marines." (Leuba, Tr. 117, 118, 124-126, 135, 157, 159-160.)

However, in each year from 1971 through 1975, the Navy methodically transferred Culebra air-to-ground and ship-to-shore NGFS training operations to Vieques, so that by the end of 1975 the Navy had transferred to Vieques all of the military training activity that it had been conducting on Culebra and which could be physically contained on Vieques. (Leuba, Tr. 56-57, 113, 127-28, 137.)

Dr. Leuba testified clearly and emphatically that military operations had been transferred from Culebra to Vieques *in each* of the years 1971, 1972, 1973, 1974 and 1975, and that by 1976 "there was nothing left on Culebra to transfer." (Leuba, Tr. 56-57, 83, 128.)

Navy training levels actually declined more sharply than manpower. (Leuba, Tr. 68-70.) Thus, while Navy overall manpower levels were declining and while Navy training requirements were declining even more rapidly than manpower levels, the level of ship-to-shore and air-to-ground training on Vieques was *increasing*. This, too, corroborates Dr. Leuba's conclusion that in each year, 1971 through 1975, the Navy transferred Culebra training to Vieques. Dr. Leuba's credentials as an expert on the subject of the Navy training conducted on Culebra and Vieques are extensive. (See Leuba, Tr. 49-53, 78, 139.)

Dr. Leuba stated:

"Q. Based on that analysis, do you have an opinion as to whether military operations have been transferred from Culebra to Vieques?

A. Yes, I do.

Q. What is that opinion?

A. I believe that activities have been transferred from Culebra to Vieques.

Q. In 1971 were training operations transferred from Culebra to Vieques?

A. Yes, they were.

Q. In 1972 were training operations transferred from Culebra to Vieques?

A. Yes.

Q. In 1973 were training operations transferred from Culebra to Vieques?

A. Yes.

Q. In 1974 were training operations transferred from Culebra to Vieques?

A. Yes.

Q. In 1975 were they transferred?

A. Yes, they were.

Q. In 1976 were training operations transferred from Culebra to Vieques?

A. No, they were not.

Q. Why?

A. *There was nothing left on Culebra to transfer.*" (Emphasis added.) (Leuba, Tr. 56-57.)

* * * *

"It doesn't matter how you measure, or what you use in base period. The conclusion is the same." (Leuba, Tr. 83.)

* * * *

> "[T]he conclusion is inescapable. It [Culebra training] was moved." (Leuba, Tr. 128.)

In its Answer to the Complaint, the Navy denied that it transferred Culebra training operations to Vieques. Paragraph 138 of the Complaint alleges:

> "Defendants have increased military operations on Vieques in whole or in part by transferring to Vieques directly or indirectly all or some of the military operations formerly conducted on Culebra."

Paragraph 142 of the Complaint alleges:

> "Defendants have neither requested nor obtained approval from the Commonwealth of Puerto Rico to move military operations from Culebra to Vieques."

The Navy's Answer admitted that the Navy had not obtained approval from the Government of Puerto Rico to move military training from Culebra to Vieques and denied that operations had been transferred. (Answer to CRB Complaint ¶¶ 138 and 142).

However, at the trial defendants offered no evidence on the transfer issue. Defendants did not contest Dr. Leuba's testimony that it had transferred Culebra training operations to Vieques. Defendants did not attempt to deny or rebut the overwhelming documentary evidence, grudgingly produced by the Navy itself, that a transfer to Vieques had transpired.[4] While the Navy

---

[4] The Navy had listed as defense witnesses on the transfer issue Admiral John Jenkins and Ronald Kirkpatrick, a Navy statistician. (See Pretrial Order). Neither ultimately appeared as a witness. Mr. Kirkpatrick had prepared a report on behalf of the Navy on the hours of operation in Culebra and Vieques during the period 1970-1975, ostensibly intended to demonstrate that no transfer of operations occurred. (See Pretrial Order, list of defendants' exhibits). This report had been submitted to plaintiffs prior to trial as proposed defendants' Exhibit 28. Dr. Leuba analyzed this Navy report and was prepared to testify as to why it did not refute his conclusion that the Navy had transferred to Vieques. (Tr. 108.) Defendants' objected to Dr. Leuba's proposed testimony discredit-

failed to offer any direct evidence in its own defense on the issue of the unlawful transfer from Culebra to Vieques during the trial, it did provide additional, conclusive evidence in the form of direct admissions that the Navy had indeed transferred Culebra weapons training activity to Vieques.

Vice-Admiral George Kinnear, Commander of Naval Air Atlantic was called as an expert witness for the Navy on the question of the Navy's alleged need to train on Vieques. Admiral Kinnear offered no direct testimony on the levels of training in Culebra and Vieques in the Navy's defense on the transfer issue. However, during cross-examination Admiral Kinnear admitted that the Navy transferred Culebra activities to Vieques as a result of the termination of training on Culebra. The Admiral testified:

> "Q. Do you know where operations formerly being carried out in Culebra as specified in these statements are being performed at this moment?
>
> A. Throughout the training facilities in the Atlantic Fleet which there is no immediate replacement for the Naval gunfire *other than that on Vieques.*" (Emphasis added.) (Kinnear, Tr. 3308.)
>
> * * * *
>
> "A. And you want to know where the exercises that were taking place on Culebra at that time are taking place now?

---

ing defendants' analysis on the question of transfer on the grounds that the testimony and report of Mr. Kirkpatrick had not yet been offered by the Navy. (Tr. 108-109.) After Dr. Leuba's extensive analysis demonstrating that the Navy had indeed transferred operations to Vieques, the Navy failed to offer this report or any other exhibit or testimony in its defense on the issue of transfer. Having evaluated this Navy report, however, Dr. Leuba testified that it corroborated his own conclusions that a transfer occurred. (Leuba, Tr. 158.) Thus, defendants appeared at trial ready to proceed with two witnesses on the transfer issue, only to fold after hearing plaintiffs' transfer case.

Q. Yes, sir.

A. A substantial number of those, I'm sure, are taking place in Vieques. . . ." (Kinnear, Tr. 3310).

Admiral Kinnear also testified,

"I'm willing to agree that much of what was being done on Culebra was probably then, regardless of how much it's been reduced in total quantity, now being done on Vieques. . . ." (Kinnear, Tr. 3326).

It was also revealed during the trial that Admiral Flanagan, while Commander of Roosevelt Roads Naval Station, had suggested that since the closing of Culebra, the Vieques range had become very crowded and that the training on Vieques had become difficult due to the crowding. This admission was made casually in a social setting in the presence of the United States representative to the Joint Commission on an Alternative to Culebra. It produced consternation in this official of the United States Government because of the *implication* that an increase had occurred on Vieques as a result of restriction on the use of Culebra. (Sanjuan, Tr. 40-41.)

In addition to expert evaluation of Navy operations data and the admission under cross-examination of the Navy's Admiral Kinnear, the Navy belatedly produced *on the last day of trial* additional conclusive proof that it transferred operations from Culebra to Vieques. On August 4, 1978, plaintiffs submitted interrogatories on the Navy together with a Supplemental Request For Production Of Documents. (See requests No. 5 through 58.) Four months and seven days later (after repeated protests by plaintiffs' counsel about defendants' delay) the Navy produced *on the last day of trial* certain classified documents in response to this request. (Tr. 6798-6799.)

These Navy documents are classified "Five Year Development Plans" for the U.S. Navy Atlantic Fleet Weapons Training Facility. *Portions* of these documents were declassified *after* the trial (of necessity due to the

Navy's untimely production) and received as CRB Exhs. No. 419-421. Each Navy document contains an explicit admission that Culebra training activity was transferred to Vieques.

The Navy Five Year Development Plan for fiscal years 1978-1982 was written on October 14, 1975. (CRB Exh. 419.) (See plaintiffs' Motion to Admit these documents, filed January 4, 1979). The Navy document states:

> "Although *targets have been installed at Vieques to replace the loss of Culebra targets*, training limitations are to be expected due to the requirement that scheduling of air-to-ground, close air support, and NGF exercises must be coordinated with the Marine Corps Command by integrating operations, scheduling and other controls." (Emphasis added.) (*Id.*, ¶ 5-3.2.)

The Navy makes the same admission in the Five Year Development Plan written on November 29, 1976 [5] and that written on November 11, 1977,[6] except that in the Five Year Development Plan of November 1977, shortly before this lawsuit was filed, the Navy *deleted* from the above quotation the phrase "to replace the loss of Culebra targets." [7]

In the previously classified portions of these documents, the Navy also admitted that the continuous development of Vieques was directed towards the "[a]bsorption of exercises formerly conducted on the Culebra Complex." [8]

The Navy's conclusive admissions that it transferred Culebra training to Vieques, coming to public light *only*

---

[5] CRB Exh. 420, at ¶ 2-6.2 and ¶ 3-1.2.

[6] CRB Exh. 421, at ¶ 2-6.2 and ¶ 3-1.2.

[7] CRB Exh. 421, at ¶ 2-6.2 and ¶ 3-1.2.

[8] CRB Exh. 419, ¶ 2-6.4; CRB Exh. 420, ¶ 3-1.4; CRB Exh. 421, ¶ 3-1.4.

after this lawsuit was initiated, are even further corroborated by a plethora of uncontroverted Navy documents (publicly disclosed only after the lawsuit was initiated, in response to plaintiffs' Motion for Production of Documents filed on March 6, 1978), that reflect that the Navy was aware of official restraints against a transfer to Vieques and planned to carry out the transfer to Vieques gradually and without public visibility.

Considered together with the compelling, unrebutted evidence that a transfer did occur, these documents stand in direct conflict with the Navy's statements made prior to this trial to the Government of Puerto Rico and to this Court in its Answer to the Complaint, that a transfer did not occur.

The Navy acknowledged *internally* prior to the termination of its use of Culebra targets that a transfer to Vieques would probably be necessary. (CRB Exh. 16.) The Navy stated *internally* that a Presidential decision or Congressional action requiring a departure from Culebra would be cause to seriously consider unilateral action to relocate Culebra training activity either temporarily or permanently to Vieques. (CRB Exh. No. 11, p. 3.) The Navy speculated *internally* that a transfer of Culebra weapons training to Vieques could be accomplished with out an apparent increase in training activity on Vieques if guard boat patrols were used to prevent range-fouling by fishing vessels, and if "improvements" were made in range scheduling and in range instrumentation,—including installation of ships positioning radar—thereby increasing the "efficiency" with which the Vieques range could be used. (CRB Exhs. 16, 27, 75, 76, 77 and 89).

The Navy in fact made such changes in the use of the Vieques range. (CRB Exh. 417, Answer to CRB Interrogatories No. 50 and 147.)[9] The Navy civilian person-

[9] See also, CRB Exh. 74, an October 1974 internal Navy dispatch acknowledging that the range patrol function on Vieques was to attempt to accomplish Culebra operations on Vieques with reduced hours.

nel for the guard boat patrol and range command function on Vieques increased dramatically between 1974 and 1975. (CRB Exhibits. 78, 79, 92, 93, 102, 104, 417, Answers to CRB Interrogatories No. 66 and 133). After 1975, personnel and expenditures on Culebra dropped substantially. (CRB Exh. 417, Answer to CRB Interrogatory No. 67.) After 1975 the Navy in fact installed ships positioning radar and other target and range "improvements" on Vieques. (CRB Exh. 417, Answer No. 50 and 147.)

Yet the Navy concealed its shift of operations to Vieques and emphasized as early as December 1971 that it should be very careful *not to appear* to increase the tempo of training operations on Vieques. Thus, the Navy in a confidential document stated:

> "It would *seem advantageous* to spread out the usage [of Vieques] somewhat so as to give *more ships* a chance to fire without increasing the *apparent* weekly tempo." (Emphasis added.) (CRB Exh. 125, p. 4.)

The document also states:

> "With regard to Vieques, RADM Ward indicated that *we should be very careful not to appear to increase our tempo of operations above that of previous years. . . .*" (Emphasis added.) (*Id.*, at p.2.)

The Navy in an internal communication of April 1972 also stressed that because of the "extreme sensitivity" of any plan for relocating Culebra operations to Vieques, all Navy message traffic on the subject of transfer must be "flagged limited distribution special handling." (CRB Exh. 58.)

In late 1971 the Navy internally admitted that additional construction and training would occur on Vieques in order to accommodate a transfer of Culebra training. (CRB Exh. 57.) One internal Navy communication in January 1974 acknowledged that "practically all" military training activity in the Inner Range (Culebra

and Vieques) was being transferred to Vieques. (CRB Exh. 38, p. 2.) By 1975 the Navy admitted internally that the loss of Culebra and the Culebra Cays would cause a corresponding increase in operations on Vieques (CRB Exh. No. 55), and that the impact of the pending loss of Culebra would be that all NGFS would be conduced on Vieques. (CRB Exh. 98.) In October 1975 the Navy issued an internal directive that in light of the termination of training on Culebra existing levels of training in the Atlantic Fleet Weapons Range were to be continued by more efficiently utilizing the Vieques range. (CRB Exh. 100, enclosure 1.)

While responding to restrictions on the use of Culebra by quietly transferring weapons training activities to Vieques, the Navy was publicly proclaiming that it could not do so and had not done so.

Thus, in testimony before the Senate, in late 1970 the Navy stated that it had no alternative to Culebra:

> [Senator Jackson:] "In other words, supposing they approve elimination of Culebra as a testing area, which could happen on the Floor of the Senate. Then what would you do?"
>
> [Mr. Sanders, Assistant Secretary of the Navy:] "We would simply do without." (CRB Exh. 24, at unnumbered p. 54).

In Congressional hearings in 1975 on P.L. 94-107, the Navy testified that since 1971 it had studied and rejected over thirty alternatives to Culebra, *including Vieques.* The Navy testified that *it had rejected Vieques* as an alternative to Culebra training in part because the Commonwealth of Puerto Rico opposed the transfer of operations formerly conducted on Culebra. In the 1975 Congressional hearings the Navy testified as follows:

> [Representative Talcott:] "If we accept the fact that there are overriding reasons for this Nation to give up Culebra, what alternative sites are under consideration and what will the cost be in relocating the Culebra facility?"

[Mr. Bowers, (Navy witness):] "Since 1971, the Navy has explored well over 30 sites in the Atlantic and Caribbean areas. We have also considered the feasibility of constructing an artificial island as a target facility. The vast majority of the sites were eliminated from consideration because they were beyond the practical range in which logistic support could be provided from Naval Station Roosevelt Roads. As you know, Naval Station Roosevelt Roads is the support base for the Atlantic Fleet Weapons Training Facility. In addition, almost all of the sites which are beyond a practical logistics support range were found to be unsuitable for other reasons as well. There has been previously noted in testimony that Desecheo and Monito were at one point under consideration but were rejected because of the Law of the Sea considerations as a result of a decision made by the President. The island of Monito and a portion of the island of Mona—both islands are Commonwealth of Puerto Rico lands—were offered by the Puerto Rican Government to the Navy as a replacement site for Culebra. The decision not to use them was made because of the potential adverse effect their use might have on the U.S. Government's position in Law of the Sea matters. After the Desecheo-Monito-Mona relocation site was rejected, a Commission was appointed with representatives from the Department of Defense and Navy, and the Commonwealth of Puerto Rico, and that Commission has, over the past year, been diligently attempting to find an alternative relocation site. In these negotiations conducted by the Commission, there was undertaken an examination of several sites within the jurisdiction of the Commonwealth of Puerto Rico. The only viable site identified from the Navy's point of view was the island of Vieques. Although there were some discussions on means of utilizing Vieques efficiently so as not to measureably impact the community, the

Commonwealth representatives felt that any apparent intensification of activity on Vieques was not desirable and, accordingly, the Commission began to look for alternative sites beyond the jurisdiction of the Commonwealth of Puerto Rico." (Hearings Before the House of Representatives Subcommittee on Military Construction Appropriations, 94th Cong., 1st Sess.; Military Construction Appropriations for 1976; Part I at p. 146.)

* * * *

[Mr. Talcott:] "What is the position of the Puerto Rican Government on shifting training activities from Culebra to Vieques?"

[Mr. Bowers:] "As I indicated earlier, the Puerto Rican Government has indicated its objection to an intensification of activity on Vieques as a result of the termination of activity on Culebra." (*Id.* at 147.)

In January 1975 at a meeting of the United States/Commonwealth of Puerto Rico Joint Commission on an Alternative to Culebra, counsel for the Government of Puerto Rico stated that it had been recently suggested by a Department of Defense official that the decrease in military operations on Culebra had been achieved by increasing training activity on Vieques. The Navy representative at this official meeting denied the accusation.[10] (CRB Exh. 240, p. 2.)

Thus, while Vieques was a potential alternative for consideration by both parties in case of a negotiated transfer, its clandestine use as a transfer site for Culebra training activity was neither approved by the Government of Puerto Rico (see Answer to the Com-

---

[10] The obvious question must be posed. If the Navy considered the movement of Culebra training to Vieques as lawful, why did it deny and seek to conceal the transfer?

plaint, paras. 138 and 142) nor submitted to Congress for its review and approval. This course of conduct by the Navy violated the law, in that specific requirements laid down by Congress were not met.

D. *The Navy's Transfer of Culebra Weapons Training Activity to Vieques Flouted Legal Authority.*

Introduction.

While the Navy was transferring Culebra operations to Vieques and publicly denying that it had done so, the Navy by so transferring was violating Acts of Congress, and the Orders of the Secretary of Defense and the President. The Congress constructed a system for the resolution of the dispute over Culebra training. Any transfer decision was to be preceded by the consent of the Government of Puerto Rico.

PLAINTIFFS' EXHIBITS

[SEAL]

THE GOVERNOR OF THE
COMMONWEALTH OF PUERTO RICO

March 7, 1974

The Honorable John W. Warner
Secretary of the Navy
The Pentagon
Washington, D.C.

Dear Mr. Secretary:

As I personally committed myself to Secretary of Defense, Elliot Richardson, as I testified in the special hearing of the House Armed Services Committee Conferees on November 8, 1973, and as I reiterated to you in my letter dated November 26, 1973:

> "My Government is committed, without qualification, to support the transfer of Navy operations from Culebra to the uninhabited islands of Desecheo and Monito."

Nonetheless, because I deem it in the best interest of all parties concerned, I have kept an open mind in considering three alternative plans you kindly submitted to me on behalf of the Navy.

I have diligently and exhaustively studied these alternatives and have met with the Mayor and other representatives of Culebra, directly and independently surveyed opinion there and in Vieques, and sought out technical advice from representatives of Culebra, knowledgeable representatives of the United States Navy and from many other sources as well.

It has always been my view that no alternative involving the transfer of any operations from the Culebra complex to Vieques or the continuation of naval train-

ing at the keys adjacent to Culebra would be acceptable unless fully supported by the residents of Culebra and Vieques. Without this prerequisite any such alternative would not be a permanent solution to the Culebra problem and, in my judgment, would only breed instability.

Through my careful and exhaustive examination of this alternative, I have determined that there is a substantial body of opinion in Culebra and Vieques, based on genuine concern, that is adamantly opposed to any alternative involving the transfer of any part of the training now taking place at Culebra to Vieques and to the continuation of naval training at the keys adjacent to Culebra. In the final analysis, I have concluded that it is these people who live under the circumstances of naval training who must determine their own future.

It is my firm decision, therefore, that the best alternative is that all naval gunfire support training and air-to-ground weapons training be transferred from the northwest peninsula of Culebra and from the Culebra off-shore cays to the uninhabited islands of Desecheo and Monito off the west coast of Puerto Rico.

Accordingly, and in conformity with last year's federal Culebra legislation, the Commonwealth of Puerto Rico hereby agrees to make available to the United States Navy for the long-term continued use of the Atlantic Fleet Weapons Range and Fleet Marine Force Training Area by the Navy: (1) the island of Monito and portions of the island of Mona reasonably required to facilitate weapons training at the island of Monito relocated from the Culebra complex, and (2) present areas and facilities on the island of Vieques for continuation of training now conducted there. I understand that Desecheo now is in federal ownership and available from the property inventory of General Services Administration for selection by the United States Navy.

The Commonwealth Government hereby agrees further that it will not undertake any proposed facility or ac-

tivity which would interfere with the Navy training mission, specifically including construction of the proposed deep water superport on the island of Mona if this project would interfere with the Navy training mission at Desecheo and Monito.

It is my hope and intention that my letter signed today, together with whatever transmittal letter you wish to send, will constitute the "satisfactory agreement" between the Navy and the Commonwealth of Puerto Rico required to be reported to the Committees on Armed Services of the Senate and the House of Representatives and to be reported by the Secretary of Defense to the Committees on Appropriations of the Senate and the House of Representatives. If, however, you require any additional action on my part to effect the relocation of the Culebra weapons training complex, I am at your disposal and hope we can expedite this transfer in every way possible.

I want you to know how much I appreciate your efforts which have made possible this permanent and satisfactory resolution of the Culebra dispute.

Sincerely yours,

/s/ Rafael Hernandez Colon
RAFAEL HERNANDEZ COLON

[SEAL]

DEPARTMENT OF THE NAVY
OFFICE OF THE CHIEF OF NAVAL OPERATIONS
Washington, D.C. 20350

IN REPLY REFER TO
Ser 40B/2981
12 June 1974

MEMORANDUM FOR THE VICE CHIEF OF NAVAL OPERATIONS

Subj: Culebra/Vieques

Ref: (a) TELECON OP-09A and OP-04A of 11 June 1974

1. This memorandum responds to the two questions posed during reference (a).

a. *"What can we do at Culebra that we can't do at Vieques?"*

(1) Naval Gunfire Support (NGFS) training can be conducted at both sites, but live ordnance may be used at Vieques whereas only inert "PUFF" projectiles are authorized at Culebra.

(2) A comparison of air-to-ground (A/G) training capabilities is as follows:

Culebra Complex	Vieques
Loft, over-the-shoulder, dive and radar bombing. (One of three targets is instrumented)	Strafing
	Close air support exercises
Rocket firing	Walleye missile
Profile tracking radar	

(3) Summary—While the NGFS and certain of the A/G exercises can be conducted at both locations, it is best to say that current facilities in the Culebra complex

and on Vieques complement one another, a flexibility that reduces scheduling problems during busy training periods, e.g., SPRINGBOARD.

b. *"Why not move to Vieques?"*

(1) The relocation of training from the Culebra complex to Vieques has the following advantages:

(a) Should satisfy Congress.

(b) Eliminates all weapons training on Culebra and its off-shore cays.

(c) Retains geographically and operationally intact the Inner Range Complex of the Atlantic Fleet Weapons Range.

(d) Meets the requirements of enacted legislation.

(e) Avoids Law of the Sea issue.

(f) Poses no danger to residents on Vieques.

(g) Of all alternatives it can be accomplished with less funding and in shorter time.

(2) Disadvantages:

(a) Increases the current level of training on Vieques contrary to the expressed wish of the Governor of Puerto Rico during recent agreement negotiations.

(b) Causes increased, but not insurmountable, scheduling problems.

(c) May complicate the achievement of the SECDEF objective of ensuring, through the agreement with the Commonwealth, the long term continuation of the Navy and Marine Corps weapon ranges on Vieques.

(3) The Navy is committed to a relocation of weapons training from Culebra, the NGFS training as a minimum. We prefer that Vieques be the relocation site, the recommended first choice of the 1972 Culebra Study. This would entail construction of & rearrangement of existing targets and installation of additional command and control equipment.

2. It would not be advisable to unilaterally commence relocation initiatives now because:

An agreement with the Commonwealth has not been reached (SECDEF recently suspended negotiations); a NSC Under Secretaries Committee memorandum addressing the Law of the Sea problem and relocation options is awaiting a Presidential decision; and appropriated funds will not be obligated until Congress approves an agreement.

3. A near future decision and/or Congressional action could necessitate a partial or total Navy departure from Culebra in 1975 with a relocation site not clearly defined or, if defined, one that could not be ready for use in 1975. These factors, coupled with potential future negotiation problems with the Commonwealth would be cause for us to seriously consider unilateral action to relocate either temporarily or permanently to Vieques. It is presently too soon to sort out all factors surrounding such a judgment.

Very respectfully,

/s/ W. D. Gaddis
W. D. GADDIS
Deputy Chief of Naval Operations
(Logistics)

[EMBLEM]

COMMANDER CARIBBEAN SEA FRONTIER
COMMANDANT TENTH NAVAL DISTRICT

11 January 1974

RADM William F. Clifford, Jr., USN
Director, Logistic Plans Division
OPNAV
Navy Department
Washington, D.C. 20350

Dear Bill,

As I told you in our recent telephone conversation, I think that your three plans represent very sound staff work. I have had them reviewed both here and at AFWR, and the results are contained in the comments appended as an enclosure to this letter.

Plan Number Two is, of course, the one we would like to see implemented, and if in the course of negotiations it appears that we are forced to modify it by retaining only Cross Cay, this could be accommodated, although it would certainly limit our flexibility. As you know, this solution has the advantages of substantially reducing the airspace warning, danger, and restricted areas, while eliminating the cost of relocating the Cross Cay scoring system and easing the pressure on Vieques. Since the retention of Cross Cay only is essentially a modification of Plan Two, I agree with your decision not to develop it into a separate plan, but look to it as a possible fallback position during discussions with the Commonwealth.

Enclosed is a copy of a very inflammatory article in the San Juan Star and its rebuttal the following day by the FAA Area Manager. In the meantime Mr. Fenn caused the enclosed memo to be issued which clarifies former wording which I feel was unclear and added to

the situation which was under discussion during your visit. Also please note a translation of an El Mundo article which I believe describes the Copaken situation correctly.

In answer to your two questions:

a. I feel that we could cease operations on the NW Peninsula by 1 July 1974. There should not be any serious difficulties in accommodating construction activity on Vieques concurrently with an increase in range activity. This answer is predicated on the utilization of MCB assets which operate with fewer constraints than do civilian equivalents. Even with this approach, there could be stand-down periods—primarily due to Marine Corps activity. It would be desirable to negotiate and coordinate this aspect with CMC. In any event, if we are able to secure a Plan Two solution, we will have to live with whatever temporary constraints on scheduling it occasions.

b. Yes, it will be necessary to re-negotiate the Navy/CMC Vieques agreement. The language of the current agreement gives the Marine Corps preemptive scheduling authority on Eastern Vieques. With practically all inner range activity shifting to Vieques, the manner of scheduling is going to have to be modified. Other items which will also need addressing include the No-Free Zone and Safety Zone around the Cerro Matias OP, and small arms activity in Area 7A.

Sincerely,

/s/ James D. Ramage
JAMES D. RAMAGE

CONFIDENTIAL

VV SAA044

* * * *

Limited Distribution

BT
CONFIDENTIAL//N02220//LIMDIS
CULEBRA STUDY (C)
A. CINCLANTFLT 282013Z MAR 72
1. IN VIEW OF EXTREME SENSITIVITY LOCALLY OF ANY PLAN OR STUDY FOR RELOCATION OF CULEBRA TARGETS TO VIEQUES, IT IS HIGHLY RECOMMENDED THAT ALL MESSAGE TRAFFIC CONCERNING THIS SUBJ BE FLAGGED LIMITED DISTRIBUTION SPECIAL HANDLING.
GP-4
BT
0021 * * *

00——01——30——

031928X APR 72

CONFIDENTIAL

THE SECRETARY OF DEFENSE
Washington, D.C. 20301

1 APR 1971

MEMORANDUM FOR SECRETARY OF THE NAVY

SUBJECT: Culebra

As you know, I have reviewed the study of Culebra which Congress directed me to undertake and I have sent my recommendations to them. (A copy of the study and my transmittal letter to Congress are enclosed).

Generally speaking, I think we have worked out an equitable arrangement. Its success however rests on our ability to reestablish an adequate rapport with the people of Culebra, Vieques and Puerto Rico.

My letter to Congress, as well as the last section of the Culebra study itself, includes a number of recommendations which I suggest you consider very carefully. For your convenience, and to expand on some of the details and concepts, I have collected these recommendations as an attachment to this memorandum. When you implement these recommendations you should pay more attention to their spirit than to their letter. It is my intention to avoid, as much as possible, a repetition of the difficulties we had with respect to Culebra; to that end the purpose of these recommendations is considerably more important than their content. None of this is to deny the importance of their content. We are surely committed to do those things we have publicly promised to do. But it is important to do those things in a way and with a spirit which will achieve the desired result.

I have continuing confidence in the integrity and dedication of the personnel of the United States Navy and fully trust that our relations with Puerto Rico in particular and the civilian community in general will

reflect the esteem and honor in which Navy personnel are held.

/s/ Melvin Laird
MELVIN LAIRD

Enclosures (3)

CRB 67

DECLASSIFIED—1971—NE

CONFIDENTIAL

RECOMMENDATIONS FROM CULEBRA STUDY

1. End all explosive bombardment of the Northwest Peninsula of Culebra by January 1, 1972. (This will require the prompt development and production of rounds for Naval Gunfire Support training operations which emit a safe puff of smoke or otherwise simulate an explosion without the attendant hazards of explosives.) If the rounds are not available by January 1, 1972 you will have to use BL&P and spotting rounds.
2. Open all of the Flamenco Beach for public use at all times except during ship firing.
3. Construct a road to Brava Beach and a bath house there so the Culebrans will have unrestricted access to a bathing beach at all times.
4. Stop removal of sand from all beaches under Navy control and take whatever legal steps are necessary to halt unauthorized exploitation of ecological resources of Culebra which are under Navy stewardship. (This will require controls on cattle and goat grazing and legal action—through the Commonwealth—against squatters.)
5. Begin the process of instrumenting the Northwest Peninsula impact area. (Even if the ship to shore gunfire range is relocated to Vieques—which should also be instrumented—the Culebra range should be instrumented in the meantime.)
6. Continue actions to fulfill commitments made in the agreement of January 11, 1971, undertaken in response to paragraph (c) of Section 611 of Public Law 91-544.

7. Maintain unrestricted sea and air corridors between Culebra and St. Thomas, Vieques and mainland Puerto Rico.

8. Station a full time Spanish-speaking U.S. Naval or Marine officer in Dewey and another in Isabel Segunda, Vieques responsible for Range Safety. This officer should:

   a. have an office in the immediate area of the inhabitants of the island

   b. have the authority to stop operations for any necessary reason and

   c. have the communications facilities required so that he is accessible to the civilian population and in contact with the appropriate command and control centers for all range activities.

9. Hire (subject to the Mayor's right of approval) a Puerto Rican (Culebran or ex-Culebran if possible) civilian (GS 10-13 level) to live on Culebra and another (Viequan or ex-Viequan) for Vieques as resident commissioner for community relations. Each should:

   a. form and participate in a citizen's commission to act as a liaison group between the Navy and the islanders.

   b. have the authority to "halt" anything for 4 to 8 hours (while he gets higher level decision).

   c. process small claims and

   d. undertake such other actions as may be appropriate to improve the community relations aspects of Navy and Marine presence on Culebra and Vieques in particular and Puerto Rico in general.

10. Put AFWR and all ranges (Navy and Marine; surface, air, submarine, RD&T) under a Washington

Hq. (e.g., ASN(I&L) who would perhaps delegate supervision and management to the DCNO for Operations and Readiness).

11. Pursue the program recently begun by ASD(I&L) to determine ways of helping the economy of Vieques with Defense procurement or Defense employment.

12. Expand that program to consider Culebra, including civilianization of Navy observer jobs on Culebra.

13. Do not send Marine personnel who operate Camp Garcia to Vieques for temporary duty assignments which limit their stay to just under six months. (Either rotate camp management personnel with the forces being trained, or assign them there on a permanent basis. Civilianization of camp management functions should be considered.)

14. Establish a new Naval Gunfire Support safety rule: If a civilian population resides in the half circle defined by ± 90° from bearing of gun and range of ammunition being used, use BL&P or other non-exposive rounds only.

15. Establish the rule for Naval Gunfire Support training, that violation of any range safety rule (at any time, including the preview cruise) disqualifies the whole exercise. The offending vessel must pull off the range for 24 hours or suffer some other appropriate consequence. (The civilian in 9 above) can enforce this rule if necessary.

16. Do not add duds to any now sanitized range areas. (Specifically * * *

17. Once instrumented scoring data is available, studies should be undertaken to measure the effectiveness of Naval Gunfire and assess its value vis-a-vis alternative systems.

18. Begin immediately to study the relationship between future training requirements (1985 and beyond) and the expected ability/suitability of range areas.

19. In general, range activities should not be expanded where such expansion requires disturbing ecological resources (reefs, bird colonies, forests, etc.), unless such action is approved or acquiesced in by responsible authorities.

20. In order to improve the overall quality of Naval Gunfire Support readiness, consider permitting Naval Gunfire Support qualification at instrumented target sites only.

21. Begin those land surveys, training maneuver analyses, and engineering studies required to permit the option of deciding in late 1972 to move the training targets on Culebra to Vieques by June 1975.

22. Establish a full time environmental specialist position at Roosevelt Roads to inventory resources requiring special protection, develop a conservation plan, and recommendations for avoiding or reducing environmental damages and to perform liaison duties with Federal and Commonwealth environmental or conservation agencies.

CONFIDENTIAL

LCDR D. L. McCORVEY
OP-405G1, X55065
21 May 1974

CULEBRA

ISSUE

Congress introduces mandatory requirements for Navy to move out of Culebra.

EFFECT OF THE AMENDMENT

Enactment of this amendment or bill would conflict with the provisions of PL-93-166 section 204 to establish an agreement between Navy and the Commonwealth of Puerto Rico which would assure long term continuity of the Atlantic Fleet Weapons Range and specifically the Navy and Marine Weapons Training areas on Vieques Island.

Enactment of the amendment might eliminate the incentive for the Commonwealth to reach agreement with the Navy. It could further encourage the Commonwealth to oppose weapons training on Vieques.

Without a prior agreement with the Commonwealth providing lands for construction of a replacement training site, current naval gunfire and air to ground training *would have to be immediately transferred to existing facilities on Vieques.*

Relocation of all training to Vieques would:

1. increase weapons training activities at Vieques not desired by the Commonwealth
2. require the construction of additional targets on Vieques

The Commonwealth could claim that Navy had subverted the intent of PL-93-166 section 204 to resolve the issue of selecting a relocation site by negotiation. (See discussion of TAB A)

Without the provision of funds for replacement training facilities on Vieques and the achievement of agreement with the Commonwealth of Puerto Rico that ensure the long term continuation of the Atlantic Fleet Weapons Range, a move from the Culebra Complex could result in the degradation of naval gunfire and air weapons delivery proficiency in the Atlantic Fleet and ultimately in Commonwealth moves to decrease Vieques training.

DEFENSE POSITION

Oppose any immediate mandatory relocation from Culebra unless Congress is prepared to protect Defense (Navy) interests on Vieques and make funds available through PL-93-166 to provide facilities on Vieques to permit execution of the amendment. We would prefer to continue under the direction of PL-93-166 Section 204.

Oppose Congressional selection of any alternative site that has not been carefully reviewed with the Department of Defense.

DISCUSSION

Any amendment must be clear as to whether the Northwest peninsula of the main island of Culebra or the main island plus the off shore cays now used by Navy are the subject of the amendment.

If only the Northwest peninsula is specified the Navy would have no serious objection as the naval gunfire training now conducted there would be moved to existing naval gunfire ranges on Vieques. This would require significant changes in fleet scheduling and exercise policies, but could be done. This was

proposed to the Commonwealth of Puerto Rico as one solution to avoid a conflict between the USG law of the sea position at the forthcoming International Law of the Sea conference and the planned use of the Mona Passage for a weapons training relocation site. The Commonwealth rejected the proposal stating that this increase in activity on Vieques would be contrary to the best interest of residents of Vieques. The Navy position is that with improvement of the existing facilities and range instrumentation that there would be no additional danger or disturbance to the residents of Vieques. In view of the Navy's presentation and the Commonwealth's rejection of this proposal, an amendment for removal of naval gunfire training could be perceived by the Commonwealth as an attempt by Navy to use Congress to achieve what has been unattainable to date by direct negotiations. Such an event would no doubt harden the Commonwealth's position, further decreasing the possibility of reaching the agreement required by the Congress to protect the Vieques training areas.

If the amendment also includes the air-to-ground training on the Culebra cays (i.e. all active weapons training in Culebra Complex) Navy would again have to shift training to Vieques. This would create significant scheduling problem increase training activity at Vieques and require construction of additional targets on Vieques to absorb the additional training. It would further give voice to Commonwealth claims that Navy had subverted the intent of the currently enacted legislation, PL-93-166, section 204. Again if Congress is prepared to protect Navy interests on Vieques, accept the political affront to the Governor of Puerto Rico, and provide sufficient funds to execute the amendment, Navy could not object on terms of readiness and training since Vieques was the preferred relocation site proposed in the 1972 Culebra study.

CULEBRA AGREEMENT NEGOTIATIONS

Chronology

Date	*Event*
2 November 1973	First Negotiating Session-Secretary Bowers VADM Gaddis exchange preliminary view with Commonwealth representatives, Representative Benitez-Culebra is fundamental issue, both seek mutually acceptable solution, agree to confidentiality, use of Culebra off shore targets and Law of the Sea issue raised.
8 November 1973	Testimony by Navy and Commonwealth before the House Armed Services Committee. Copaken representing Mayor of Culebra and Governor, Law of the Sea issue raise. Testimony by John Moore. Secretary Warner met with Governor Hernandez-Colon on two occasions pressing for solution which would avoid LOS issue.
26 November 1973	Governor Hernandez-Colon sent letter to Secretary Warner offering to consider other sites and requested a concrete plan related to the use of the Culebra Keys and Vieques.
6 December 1973	Representative Benitez sent letter to Secretary Bowers requesting submission of three plans, (i.e. I.—Desecheo/Monito; II.—Vieques/Culebra Keys and III.—Desecheo/Culebra Keys).
20 December 1973	Secretary Warner discusses the three requested plans with Representative Benitez.

3 January 1974

Mr. Copaken requests in the name of the Governor a copy of the three plans for review and consideration by the Governor. Advised that plans would be furnished if Governor so requested.

8 January 1974

Governor Hernandez-Colon designates Representative Benitez as Commonwealth representative with respect to these particular aspects of the Culebra matter. Also requests copies of the three plans.

9 January 1974

Secretary Warner sends letter to Governor Hernandez-Colon forwarding the three plans and offered to meet personally with Governor to receive his evaluation of the three plans.

14 February 1974

Governor Hernandez-Colon meets with Secretary Warner and discusses impact of Vieques/Culebra Keys plan on Culebrans.

15 February 1974

Secretary Bowers sends letter to Governor Hernandez-Colon providing additional detail on impact of the Vieques/Culebra Keys plan on fishing around Culebra and transportation to the island.

7 March 1974

Governor Hernandez-Colon sends letter to Secretary Warner rejecting the Vieques/Culebra Keys plan and advocated the Desecheo/Monito plan as a basis for agreement. Also states no increase in use of Vieques could be accepted by Commonwealth.

15 March 1974

Secretary Warner sends letter to Governor Hernandez-Colon calling for additional consultation and re-

quests designation of the Commonwealth representative.

19 March 1974

Governor Hernandez-Colon Telegram to Secretary Warner designates Mr. Copaken Commonwealth attorney to prepare a draft (agreement) with Secretary Bowers.

25 March 1974

Meeting with Mr. Copaken—Asks for demonstrable act by Navy on 1 July 1975—Suggests LOS issue can be applied to Virgin passage/Culebra reports environmental resistance to placing people on Mona—Navy will provide a proposal in two weeks.

9 April 1974

Secretary Bowers sends letter to Governor Hernandez-Colon offering two Mona Passage plans (i.e. on updated Desecheo/Monito Plan and a Mona/Monito plan) indicating the Mona/Monito plan would be superior. Copy of letter delivered to Copaken at negotiating session same day. Copaken raises issue of environment of Mona and questions unsuitability of Desecheo.

12 April 1974

Negotiating session—Repeat of environmental objections and suitability of Desecheo.

17 April 1974

Governor Hernandez-Colon refers Secretary Bowers to Mr. Copaken for the Commonwealth response to his 9 April letter. Governor does not take written position.

18 April 1974

Telephone call from Mr. Copaken to Capt. Jenkins stating Governor Hernandez-Colon rejects Mona option.

CINCLANTFLTNOTE 5400
3 APR 1975

NAVY-MARINE CORPS JOINT USAGE PROCEDURES FOR VIEQUES

1. *General.* With the loss of the Culebra Target Complex, and prior to construction of replacement facilities, the impact area on eastern Vieques must be used for naval gunfire support and air-to-ground operations as well as for Marine artillery firing operations. Target realignment within the designated impact area will provide for the most efficient use of the area available. Maximum cooperation and coordination are required to ensure that all Navy and Marine training requirements are met. (The map reference for the subject area is Defense Hydrographic Center Combat chart, Isle De Vieques Part 25C01, 2d Ed of 6 May 1974).

2. *Eastern Vieques Training Areas* (See Tab A)

a. *Ground Maneuver Area.* That portion of the eastern Vieques operating area west of the 528 grid line. Training evolutions within this area will be as directed by the Commanding Officer, Camp Garcia.

b. *Artillery Impact Area.* Unless specific allocations are made in the CINCLANTFLT Quarterly Employment Schedule, this area (between the 528 and 559 grid lines) will normally be available for use of Marine artillery. A no-fire zone is established to protect the Cerro Matlas Observation Post. There will be no firing within 1000 meters of that position (see Tab A).

c. *Naval Gunfire/Air Impact Area.* Designated Naval Gunfire Targets, Close Air Support Training Targets, i.e., airfield, SAM mockups, tanks, etc., are located in the area between the 559 and 590 grid lines. Unless specific allocations are made in the CINCLANTFLT Quarterly Employment Schedule, the naval gunfire/air impact area will normally be used for air-to-ground and

naval gunfire support training. When Marine artillery requirements include the air impact area, any conflicts will be resolved by COMNAVFORCARIB using AFWTF as scheduling agent.

d. *Eastern No-Fire Zone.* Land area east of the 590 grid. No ordnance will be expended within this area to avoid damage to the Ponta Este Light.

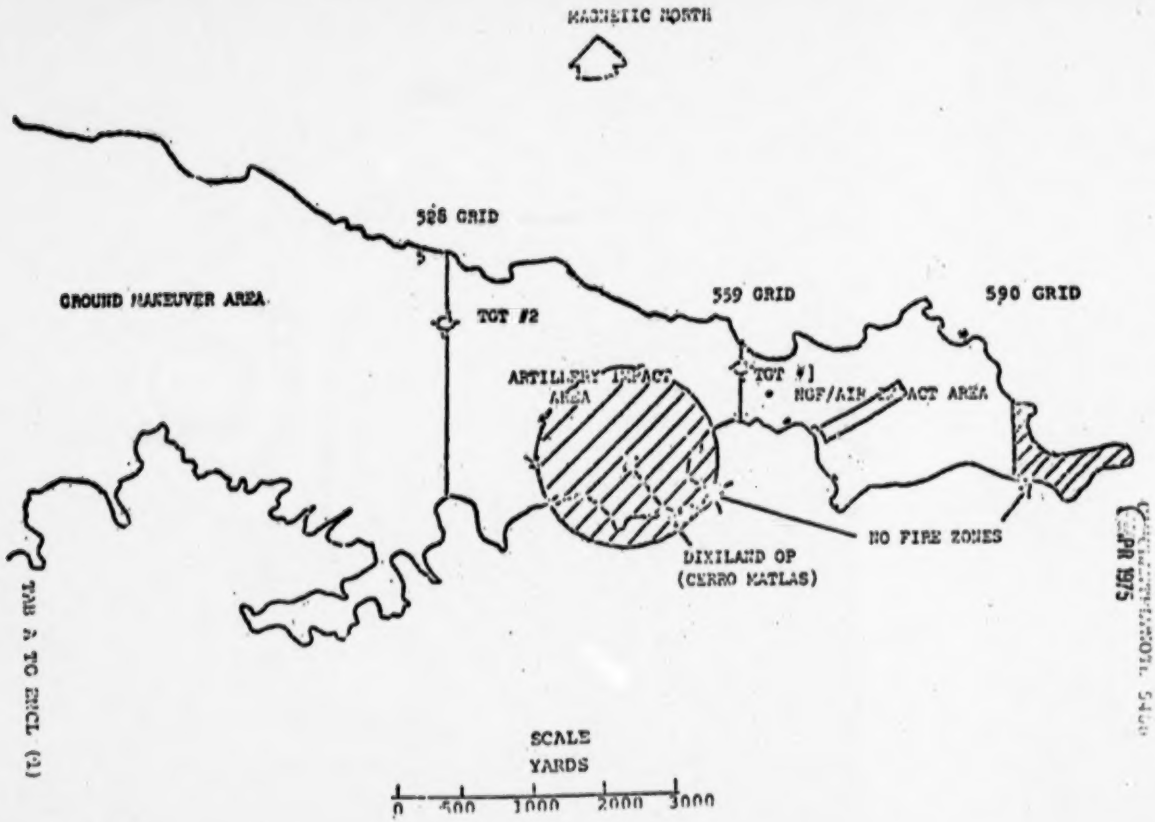
3. *Scheduling*

a. Marine and Navy training requirements for the eastern Vieques training area will be presented at the CINCLANTFLT Quarterly Scheduling Conference. Subsequent additions/changes will be coordinated between the Commanding Officers of the Atlantic Fleet Weapons Range and Camp Garcia.

b. With respect to the Ground Maneuver Area, Marine requirements have priority and will be as scheduled by the Commanding Officer, Camp Garcia.

c. COMNAVFORCARIB is assigned overall responsibility for the coordination of AFWTF training facilities. In the eastern Vieques training area this authority includes the artillery impact area, naval gunfire/air impact area, the targets therein and air-to-ground targets #1 and #2 located on the 559 and 528 grid lines.

4. *Target/Range Maintenance.* The Commanding Officer, Atlantic Fleet Weapons Training Facility will be responsible for range maintenance and target sanitation in those areas used in support of Atlantic Fleet Weapons Training Facility operations.



TAB A TO ENCL (1)

APR 1975

EXH. AT14

THE SECRETARY OF DEFENSE
Washington, D.C. 20301

MAY 24 1973

MEMORANDUM FOR THE SECRETARY
OF THE NAVY

SUBJECT: Culebra

As you know, during my confirmation hearings before the Senate Armed Services Committee in January, I indicated that I would look into the Culebra situation. In keeping this pledge, I have reviewed the lengthy history of this problem and, in particular, the views of the Department of the Navy.

In my judgment, it would be in the long-range interest of the Department of Defense to move the current Navy training activities by July 1, 1975, from the Culebra complex to the islands of Desecheo and Monito, provided:

1. That the Congress authorizes and appropriates the funds required; and

2. That a satisfactory overall arrangement can be worked out with the Government of Puerto Rico for carrying out the proposed move and for insuring the long-term continuation of the Atlantic Fleet Weapons Range and the Fleet Marine Force training area.

Until these provisions are met, and the requirements of Section 1022 c of the National Environmental Policy Act of 1969 are satisfied, current Navy activities in the Culebra complex must continue.

I realize that this decision may create certain operational difficulties, but am confident that these will be of short-

term nature and can be alleviated by careful planning and adjustment of Atlantic Fleet requirements.

It would be appreciated if your time-phased plan for implementing this decision were submitted to the Secretary of Defense by July 1, 1973.

You are also requested to keep him currently informed of the progress being made.

/s/ E.L.R.
5/24/73

137

CRB 116

Declassified/Released on Nov. 6, 1981

CONFIDENTIAL [UNCLASSIFIED]

June 22, 1974

MEMORANDUM FOR: THE SECRETARY OF DEFENSE
THE DIRECTOR OF CENTRAL INTELLIGENCE
THE UNDER SECRETARY OF STATE FOR POLITICAL AFFAIRS

SUBJECT: Culebra Naval Weapons Training

The President has reviewed the study submitted on June 6, 1974 by the Chairman of the NSC Under Secretaries' Committee and the recommendations of the members on the use of Culebra and its Cays for naval weapons training.

The President has decided that:

—weapons training activities on Culebra should be terminated by July 1, 1975,

—weapons training on the Culebra Cays should cease as soon after July 1, 1975 as possible, but in no case should the training be conducted on the Cays later than December 31, 1975.

The Secretary of Defense should consider and select alternative sites for the weapons range activities. In doing so, he should take into account relevant considerations of international law and in particular, U.S. objectives in the Law of the Sea negotiations. The selection of the new site, if it is in Puerto Rico, will be contingent on its being acceptable to the Commonwealth, and the Secretary of Defense should so inform the Governor of Puerto Rico.

The President desires that the Secretary of Defense announce this decision and inform the Congressional leadership.

/s/ Henry A. Kissinger
HENRY A. KISSINGER

cc: Chairman, Joint Chiefs of Staff

138

THE WHITE HOUSE
Washington

April 14, 1975

MEMORANDUM FOR

John A. Wickham, Jr.
Major General, U.S. Army
Military Assistant to the Secretary
Department of Defense

SUBJECT: Culebra Naval Weapons Training

Your memorandum of April 4 with the status report on Culebra is appreciated. In dealing with the termination of training at Culebra, the Department of Defense should continue to be guided by the NSC memorandum of June 22, 1974 on this subject.

/s/ B. Scowcroft
BRENT SCOWCROFT
Lieutenant General, USAF
Deputy Assistant to the President
for National Security Affairs

Attachment

EXH. A118

27 DECEMBER 1972

MEMO:

THE FOLLOWING LETTER HAS BEEN RELEASED TO INTERESTED MEMBERS OF CONGRESS.

CRB 118

In response to Section 207 of the Military Construction Authorization Act of 1972, I am enclosing the study on the weapons training now being conducted in the Culebra complex of the Atlantic Fleet Weapons Range. This study includes a description of such training as well as detailed feasibility studies of five alternative sites. I believe you will find the study thorough, objective, and balanced.

The independent study was carried out by Tippetts-Abbett-McCarthy-Stratton Engineers and Consultants, Battelle Columbus Laboratories, and Palmer and Baker Engineers, incorporated under contract to the Commander-in-Chief Atlantic Fleet. It shows that requirements for the Inner Range (Culebra and Vieques) of the Atlantic Fleet Weapons Range will not change substantially through 1985 although the study predicts a shift in the kind of operations conducted. Naval gunfire support training, the activity conducted on the northwest peninsula of Culebra, is projected to decrease, but air-to-ground weapons training, now conducted on Vieques and several rocks and cays to the west of Culebra, is projected to increase. Based on these requirements the contractors carefully reviewed some 40 sites and did detailed feasibility studies of five sites—Vieques, Mona and Monito, Desecheo, and artificial islands at Barriles Reef to the west of Culebra and at Lang Bank to the northeast of St. Croix.

The contractors concluded that the present Culebra complex is clearly superior in every regard to the alterna-

tives considered, and they recommended that the Navy continue to use the present Culebra complex. They also concluded that in their opinion Vieques was the most advantageous of the other alternatives considered based on the criteria in Section 207 of the Military Construction Authorization Act of 1972.

On the basis of this study my recommendation is that the Navy retain its training targets in the Culebra complex.

I had hoped the study would make possible the transfer away from Culebra of the remaining Navy training operations. In fact, on April 1, 1971 I directed the Navy to initiate land surveys, training maneuver analyses, and engineering studies required to provide the option, if feasible, of moving by June 1975 to a suitable alternative to the target areas on Culebra. I also stated at that time that I would "reappraise the Culebra situation and alternative option(s) from the point of view of national security and the best interests of the people of Puerto Rico by the end of 1972 in order to make a final decision where to relocate the naval training target areas now on Culebra and whether any additional action should be taken."

After reviewing the detailed study, Navy civilian and military leaders and I have concluded that the Culebra complex offers such advantages over all other alternatives studied that none of these other alternatives can be considered reasonable. The most advantageous of the alternatives mentioned by the study would be to relocate the Culebra training targets to the east end of Vieques with one air-to-ground target two miles off the northwest tip of Vieques. However, choosing this alternative would significantly reduce the capability of the Inner Range and would transfer the training activity from an island with 700 inhabitants to one with 7,000 inhabitants. I do not think this would be a prudent course of action.

Weapons systems and training requirements, however, change with time. Accordingly, the Navy will remain abreast of developments that would modify the study conclusions and the Navy's need for the Culebra Range complex. In any event, not later than the early 1980's the Navy will do a detailed study of its need for the Culebra complex after 1985 with a view toward eliminating such need as soon after 1985 as possible.

The Navy will continue to comply fully with my directives of April 1, 1971 and with the terms of its January 11, 1971 agreement with Puerto Rican and Culebran officials. The most important of these directives and terms were the elimination of all training to the east of Culebra, the termination of the use of explosive shells in naval gunfire support training and the restriction of air-to-ground training to rocks and cays to the west of Culebra. Compliance with these terms and directives has significantly reduced the irritations and hazards of Navy training and has increased the benefits to Culebra of the Navy presence. Continued compliance will provide a sound basis for the Culebrans and the Navy to live and work together harmoniously for as long as it is necessary to conduct Navy training in the Culebra area to meet national security requirements.

Sincerely,

/s/ Melvin Laird

THE WHITE HOUSE

Washington

December 15, 1970

Dear Governor Ferre:

It was particularly thoughtful of you to let me have your views on the question of Culebra. I fully appreciate your deep concern about this very complex problem, and I want you to know that all of us in the Federal Government share your sense of urgency in this matter.

As you have noted, the recently enacted Military Construction Authorization Act of 1970 requires a new study by the Department of Defense. You have requested that I "designate some appropriate person or agency to participate in this study with such authority from the President as is necessary to insure that a just and agreeable solution will emerge." By copies of this letter to the Secretary of Defense and the Chairman of the Council on Environmental Quality, I am today directing that the Council take part in the study, acting in an advisory capacity. You may be sure that the Chairman of the Council will be in continuing touch with me on this matter.

Mindful of your comments about Latin America, I am also taking another step consistent with the provisions of the Authorization Act which directs that "all appropriate Federal agencies having jurisdiction or special expertise on the subject matter involved" be consulted. Because of the Department of State's special responsibility, I am requesting that the Secretary of State be consulted throughout the study period with respect to all aspects of the Culebra question pertaining to our foreign relations; especially those with our Central and

South American neighbors. I suggest that you also identify an appropriate person to represent the interests of the Commonwealth in the conduct of this study.

With warm personal regards,

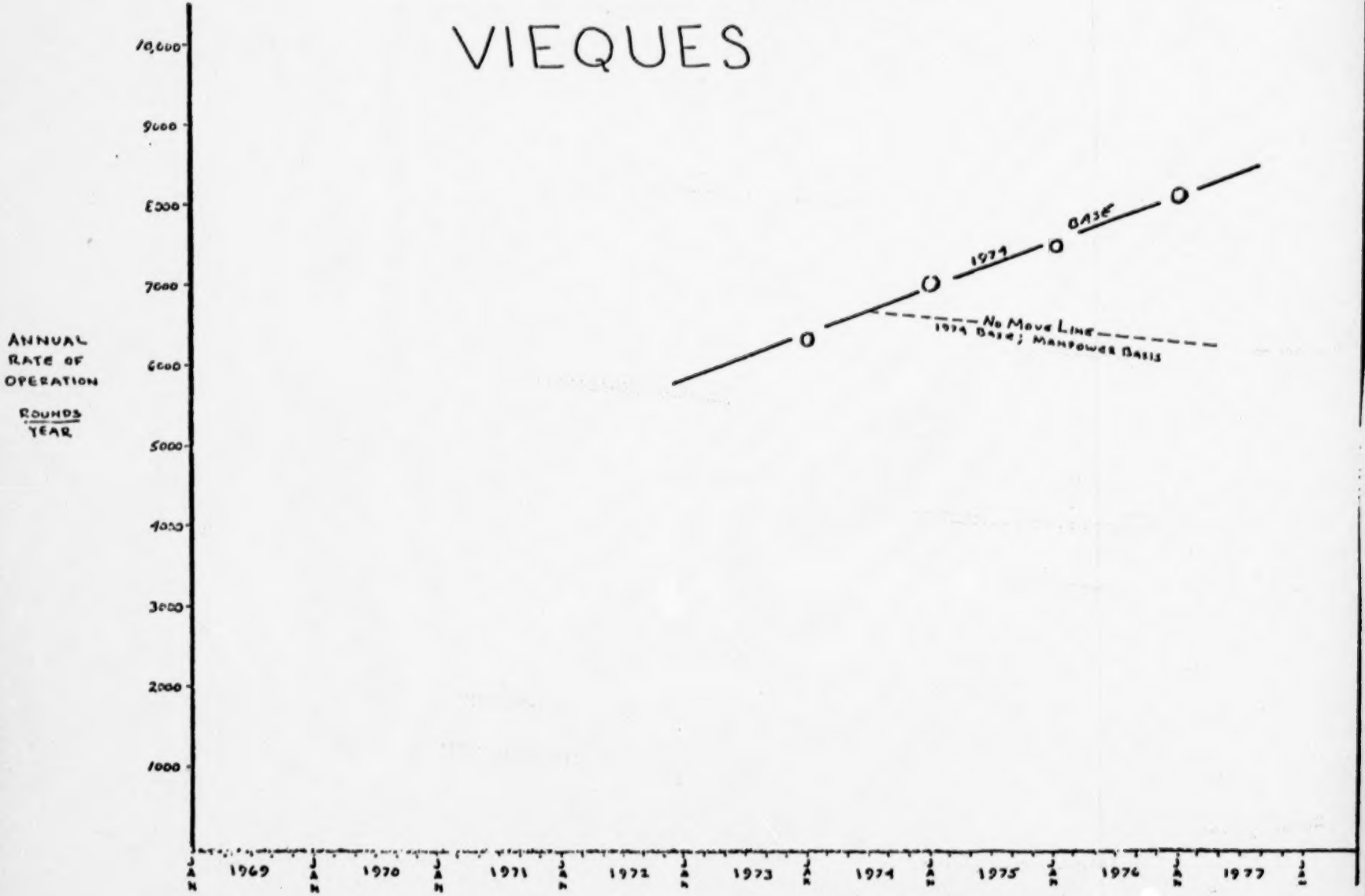
Sincerely,

/s/ Richard Nixon

Honorable Luis A. Ferre
Governor of Puerto Rico
San Juan, Puerto Rico

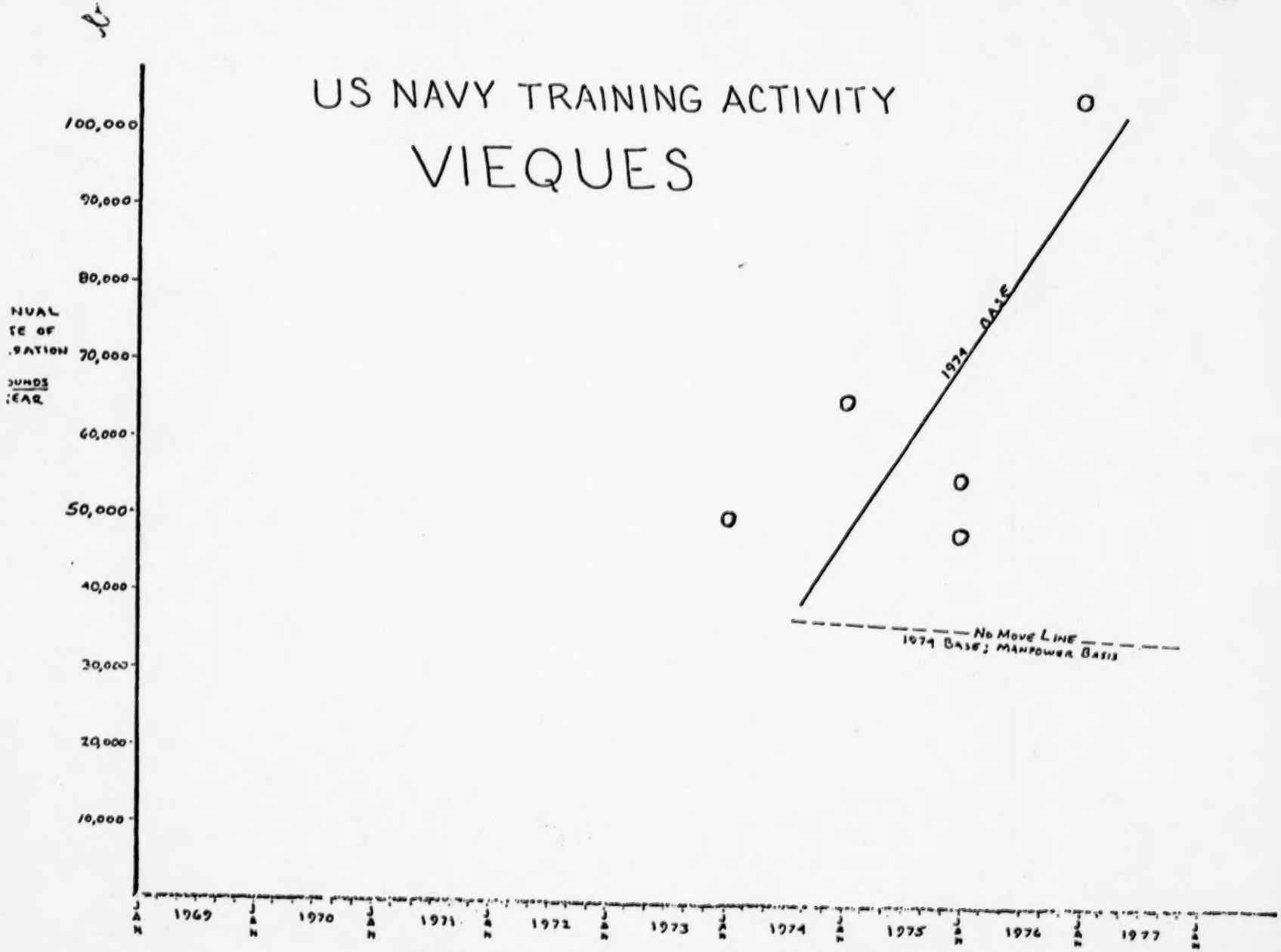
US NAVY TRAINING ACTIVITY

VIEQUES



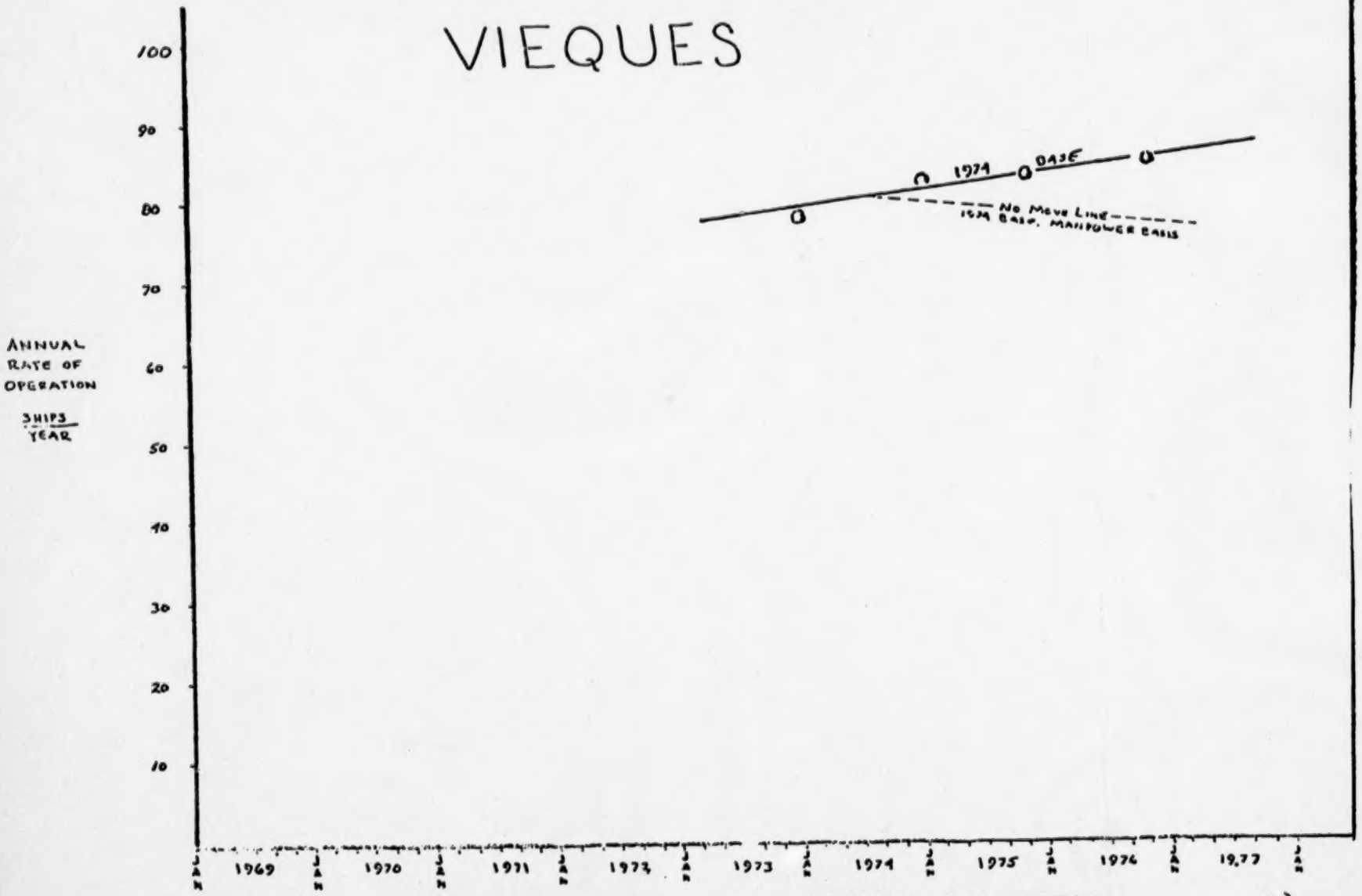
TYPE OF ACTIVITY: NAVAL GUNFIRE

MEASUREMENT INDEX: ROUNDS


US NAVY TRAINING ACTIVITY
VIEQUES
100,000
90,000
80,000
70,000
60,000
50,000
40,000
30,000
20,000
10,000
1974 BASE
No Move Line
1974 Base; Manpower Basis
JAN 1969
JAN 1970
JAN 1971
JAN 1972
JAN 1973
JAN 1974
JAN 1975
JAN 1976
JAN 1977
TYPE OF ACTIVITY: AIR TO GROUND
MEASUREMENT INDEX: ROUNDS

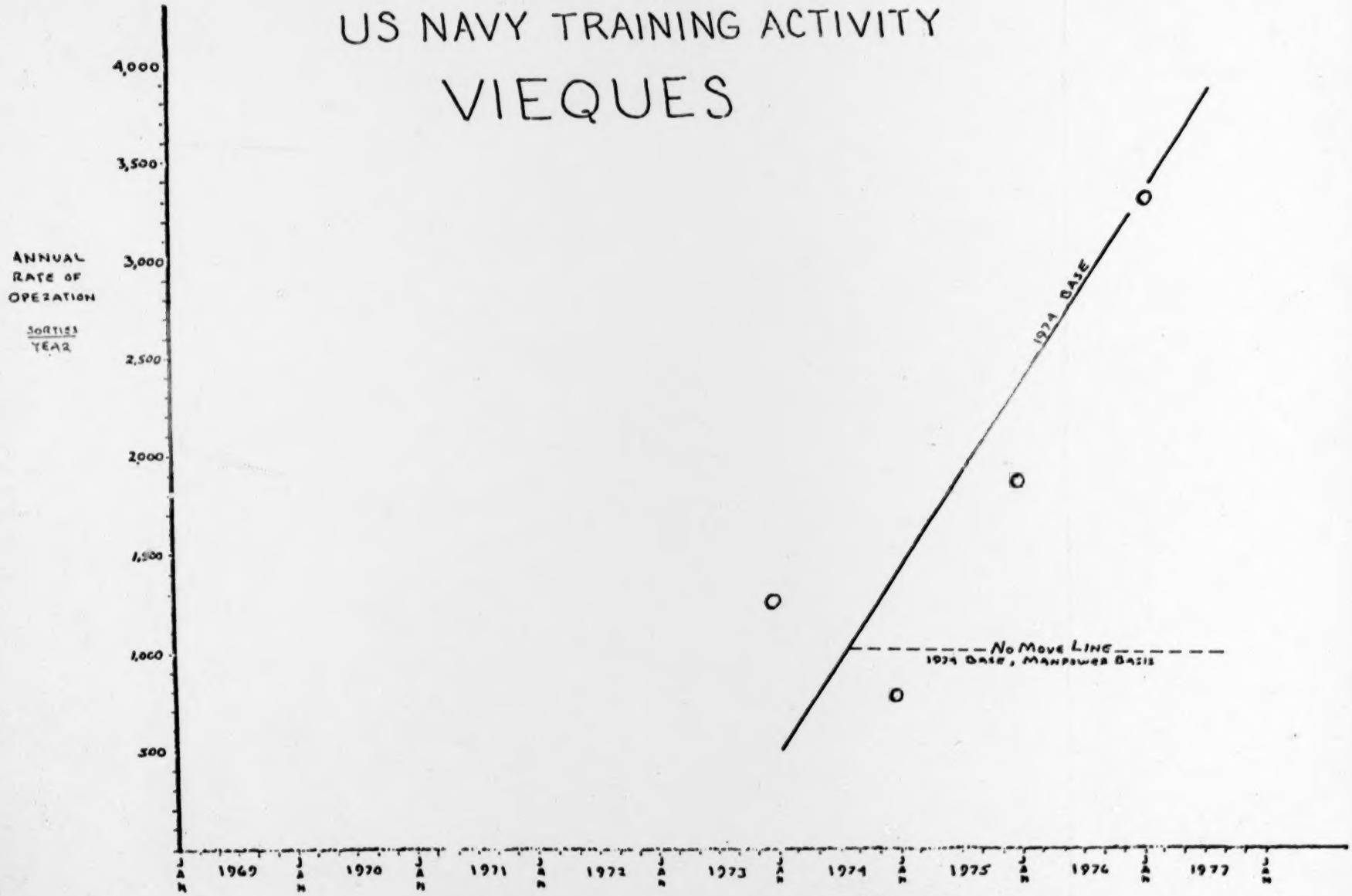
US NAVY TRAINING ACTIVITY

VIEQUES



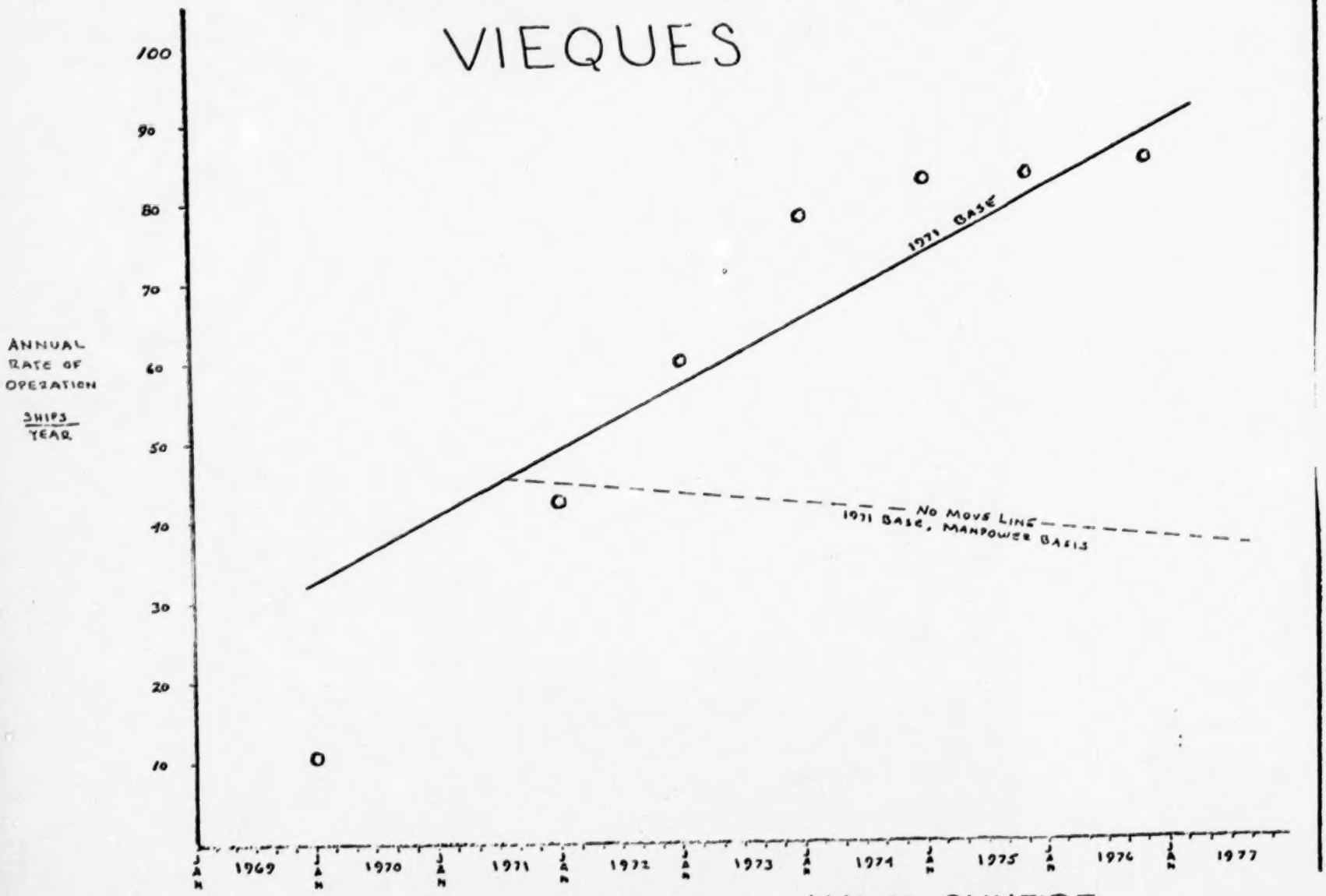
TYPE OF ACTIVITY: NAVAL GUNFIRE

MEASUREMENT INDEX: SHIPS


US NAVY TRAINING ACTIVITY
VIEQUES
ANNUAL RATE OF OPERATION
SORTIES / YEAR
4,000
3,500
3,000
2,500
2,000
1,500
1,000
500
1974 BASE
NO MOVE LINE
1974 BASE, MANPOWER BASIS
JAN 1969
JAN 1970
JAN 1971
JAN 1972
JAN 1973
JAN 1974
JAN 1975
JAN 1976
JAN 1977
TYPE OF ACTIVITY: AIR TO GROUND
MEASUREMENT INDEX: SORTIES

US NAVY TRAINING ACTIVITY

VIEQUES



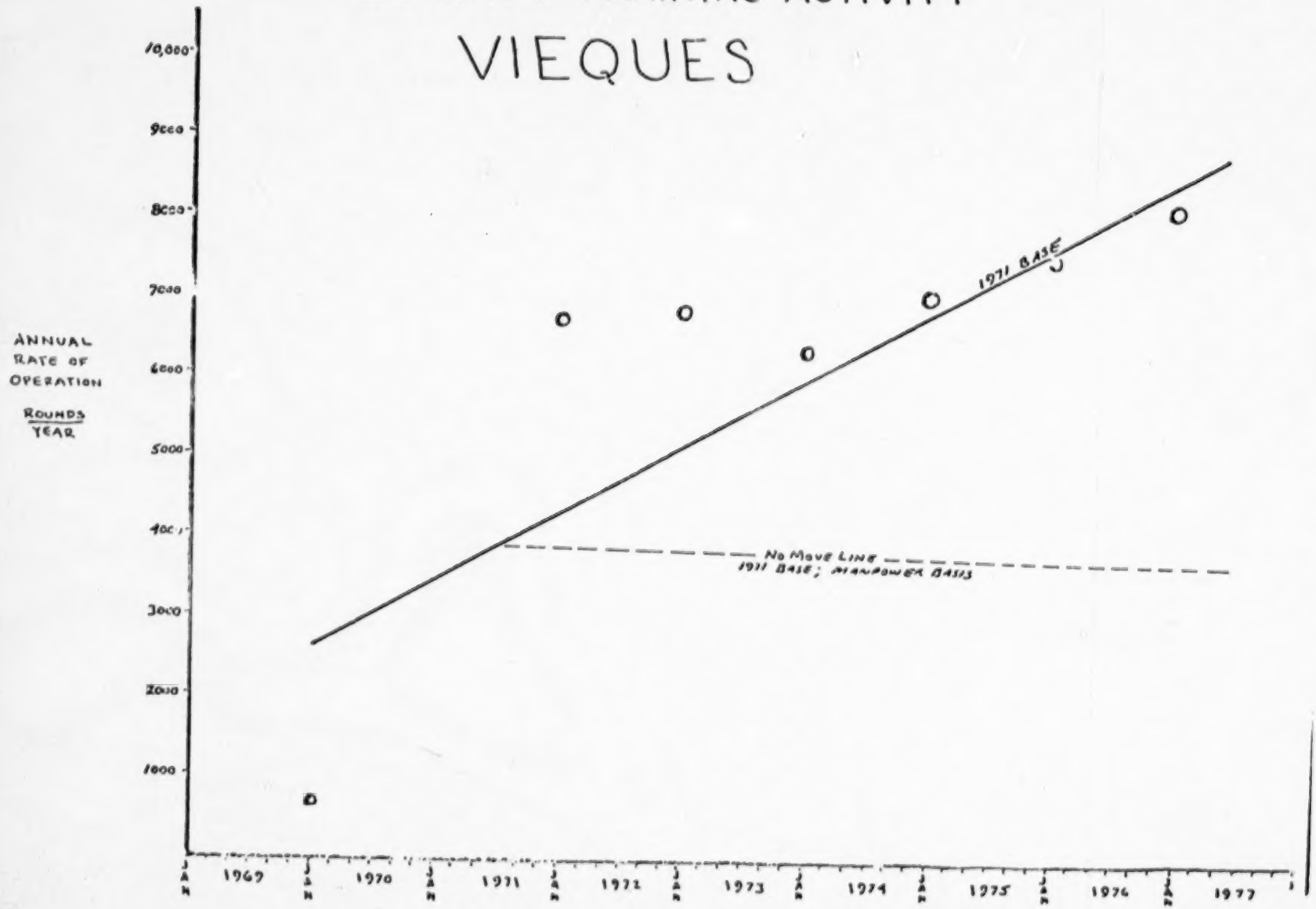
TYPE OF ACTIVITY: NAVAL GUNFIRE

MEASUREMENT INDEX: SHIPS

[This Page Intentionally Left Blank]

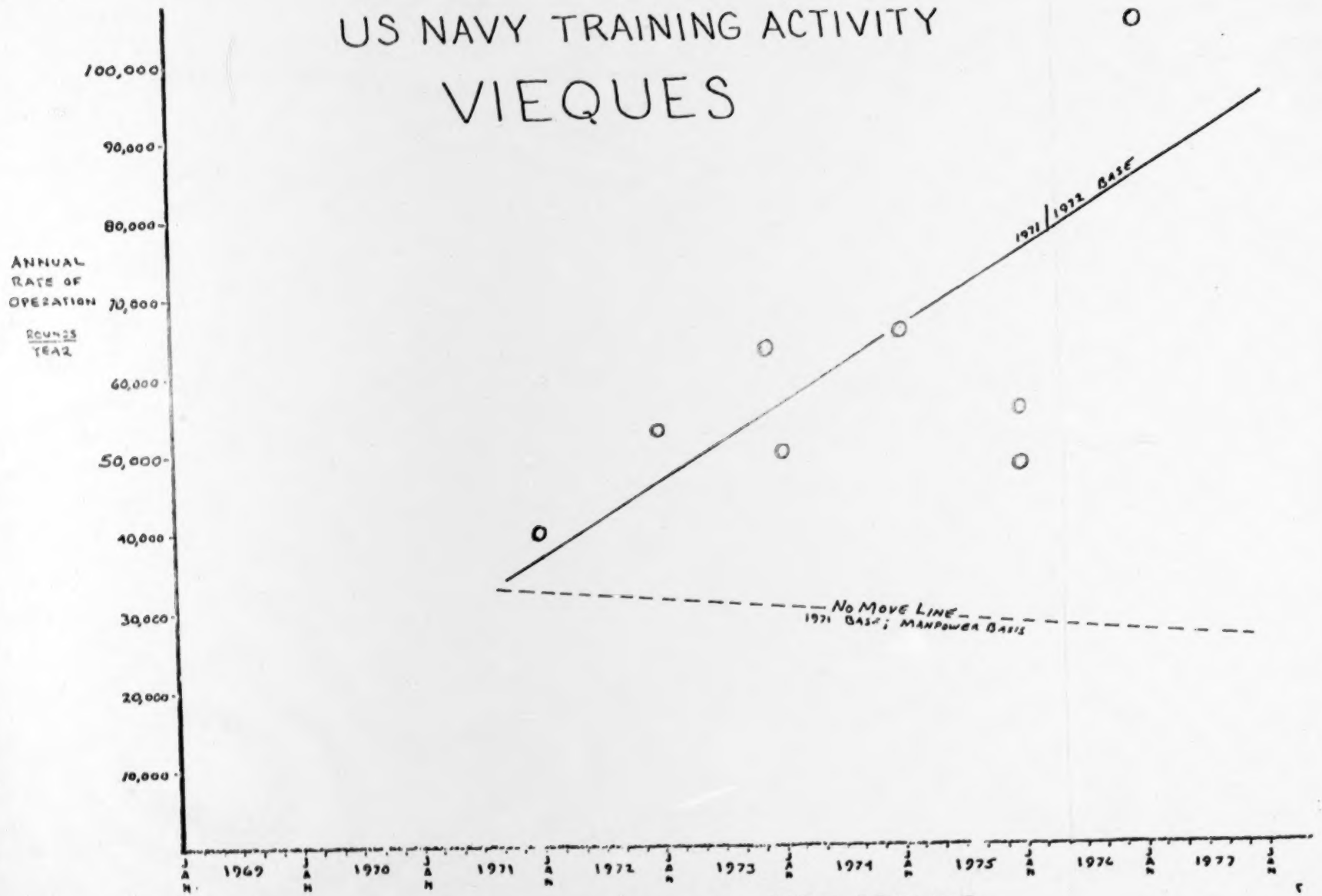
US NAVY TRAINING ACTIVITY

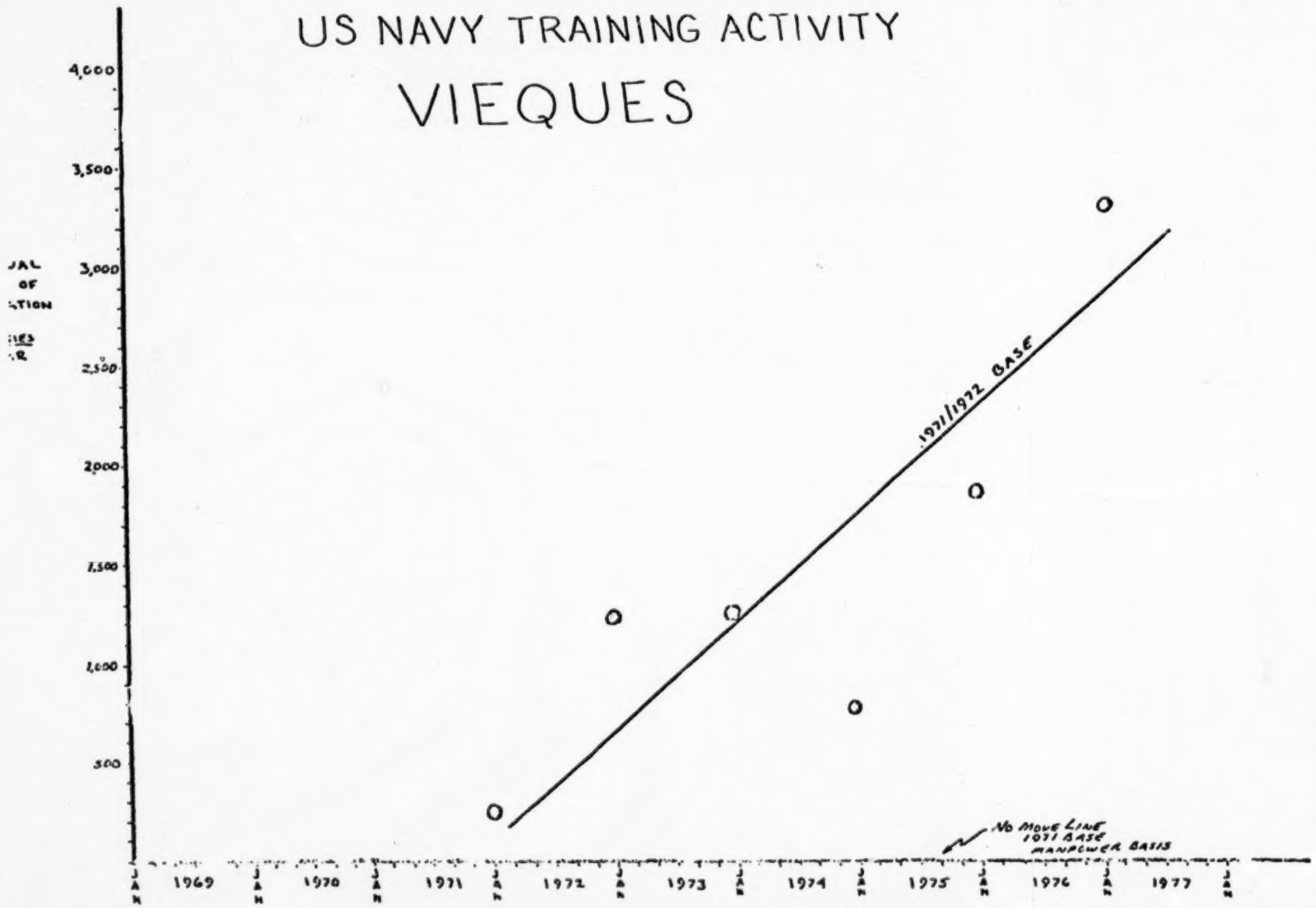
VIEQUES



TYPE OF ACTIVITY: NAVAL GUNFIRE

MEASUREMENT INDEX: ROUNDS


US NAVY TRAINING ACTIVITY
VIEQUES
ANNUAL RATE OF OPERATION
ROUNDS / YEAR
100,000
90,000
80,000
70,000
60,000
50,000
40,000
30,000
20,000
10,000
1971 / 1972 BASE
NO MOVE LINE
1971 BASE; MANPOWER BASIS
JAN 1969
JAN 1970
JAN 1971
JAN 1972
JAN 1973
JAN 1974
JAN 1975
JAN 1976
JAN 1977
JAN
TYPE OF ACTIVITY: AIR TO GROUND
MEASUREMENT INDEX: ROUNDS


US NAVY TRAINING ACTIVITY
VIEQUES
4,000
3,500
3,000
2,500
2,000
1,500
1,000
500
1971/1972 BASE
NO MOVE LINE
1971 BASE
MANPOWER BASIS
JAN 1969
JAN 1970
JAN 1971
JAN 1972
JAN 1973
JAN 1974
JAN 1975
JAN 1976
JAN 1977
TYPE OF ACTIVITY: AIR TO GROUND
MEASUREMENT INDEX: SORTIES

UNCLASSIFIED

	PP	PR		UUUU		3201	252128Z	MAY	73

FROM: CNO WASHINGTON DC

TO: CINCLANTFLT NORFOLK VA

INFO COMTEN/COMCARIBSEAFRON SAN JUAN P R

COMNAVAIRLANT NORFOLK VA

LANTFLTWPNRAN ROOS RDS P R

NAVSTA ROOS RDS P R

NAVFACENGCOM WASHINGTON DC

NAVAIRSYSCOM WASHINGTON DC

ICLAS //04000//

FENSE DECISION ON CULEBRA

THE SECRETARY OF DEFENSE FORWARDED ON 24 MAY 73 THE FOL LETTER TO THE CHAIRMEN OF THE SENATE AND HOUSE ARMED SERVICES COMMITTEES AND APPROPRIATIONS COMMITTEES: QUOTE

DURING THE COURSE OF MY CONFIRMATION HEARINGS BEFORE THE SENATE LAST JANUARY, I PROMISED THAT I WOULD CAREFULLY STUDY THE NECESSITY OF CONTINUING TO CONDUCT NAVY WEAPONS TRAINING OPERATIONS ON AND NEAR THE ISLAND OF CULEBRA. MY COMMITMENT WAS SUBSEQUENTLY REAFFIRMED TO OTHER MEMBERS OF THE CONGRESS WHO REQUESTED MY VIEWS ON LEGISLATION PROPOSED IN BOTH THE HOUSE AND THE SENATE WHICH WOULD

DRAFTER: OP-40 (405G) (25 MAY 73) NCSC
DIST: 00...09...090...03...04...05...5X3...NAVY...OLA...CHINFO...

CAPT [illegible] JENSEN, JR., OP-405G, 73611 048
RADM CLIFFORD, JR., RADM, OP-40 40
408
405

252128Z MAY 73

JOINT MESSAGEFORM UNCLASSIFIED

FROM: 02 06 3207

REQUIRE THE NAVY TO TERMINATE ITS CULEBRA OPERATIONS BY JULY 1, 1975.

I HAVE COMPLETED MY REVIEW. IN THE PROCESS, I HAVE GIVEN CAREFUL CONSIDERATION TO THE CONCLUSIONS OF THE STUDIES OF THE PROBLEM COMPLETED IN THE DEPARTMENT OF DEFENSE AT THE DIRECTION OF THE CONGRESS. I HAVE DISCUSSED THE MATTER WITH NAVY OFFICIALS AND MEMBERS OF MY OFFICE. I HAVE ALSO CONSULTED VARIOUS MEMBERS OF THE CONGRESS AND MET WITH PUERTO RICAN OFFICIALS.

CULEBRA CANNOT BE CONSIDERED IN ISOLATION FROM OTHER NAVY INTERESTS IN THE AREA. ITS TARGET COMPLEX AND SUPPORTING FACILITIES ARE IMPORTANT PARTS OF THE ATLANTIC FLEET WEAPONS RANGE AND ARE CLEARLY RELATED TO THE FLEET MARINE FORCE TRAINING AREAS ON THE NEAR-BY ISLAND OF VIEQUES. THESE VITAL NAVY AND MARINE CORPS FACILITIES PROVIDE THE TRAINING REQUIRED TO MAINTAIN THE ATLANTIC FLEET IN A HIGH STATE OF OPERATIONAL READINESS. THEIR CONTINUED OPERATION IN THE YEARS AHEAD IS ESSENTIAL. THIS OPERATIONAL READINESS GOAL WHICH HAS BEEN THE PRIMARY CONSIDERATION IN MY REVIEW, INVOLVES MANY FACTORS.

CONSEQUENTLY ANY MOVE OF NAVAL ACTIVITIES FROM CULEBRA MUST BE TO A LOCATION IN THE AREA OF PUERTO RICO WHICH WOULD SATISFY THE

DISTR:

SECURITY CLASSIFICATION UNCLASSIFIED

1 UNCLAS 1818

PAGE 13 OF 06 | 3201

FOREGOING MILITARY OPERATIONAL REQUIREMENTS. THE MOST RECENT STUDY FORWARDED TO THE SECRETARY OF DEFENSE BY THE NAVY IN DECEMBER 1972 CONCLUDED THAT ALTHOUGH THERE WERE SOME OPERATIONAL AND COST ADVANTAGES TO REMAINING ON CULEBRA, SEVERAL ALTERNATIVE SITES USING OTHER ISLANDS OFF PUERTO RICO WERE ALSO SUITABLE FROM AN OPERATIONAL VIEWPOINT AND WOULD MEET MILITARY REQUIREMENTS.

BUT ONCE MILITARY REQUIREMENTS ARE MET, OTHER CONSIDERATIONS MUST BE ADDRESSED. THE SENATE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS HAS DIRECTED THAT THE DEPARTMENT OF THE INTERIOR AND THE COMMONWEALTH OF PUERTO RICO CONDUCT A JOINT STUDY TO DETERMINE THE OPTIMUM LAND USE FOR CULEBRA. I UNDERSTAND THAT STUDY WILL CONSIDER THE OPPORTUNITIES AVAILABLE ON THE ISLAND FOR PLANT AND WILD LIFE CONSERVATION AND PUBLIC RECREATION

FINALLY, THERE IS THE COMMON AIM OF PUERTO RICAN AND DEFENSE OFFICIALS, AS WELL AS MEMBERS OF THE CONGRESS TO REDUCE AS MUCH AS POSSIBLE THE IMPACT OF NAVY TRAINING ACTIVITIES ON LOCAL INHABITANTS ALL FOUR GOVERNORS OF PUERTO RICO, PAST AND PRESENT, REGARDLESS OF PARTY, HAVE JOINED IN SUPPORT OF THE PROPOSED LEGISLATION THAT THE NAVY MOVE ITS ACTIVITIES FROM CULEBRA. THIS LEGISLATION HAS

DISTR:

SECURITY CLASSIFICATION UNCLASSIFIED 252128Z MAY 73

JOINT MESSAGEFORM UNCLASSIFIED

14 05 3231

ATTRACTED SUBSTANTIAL SUPPORT IN THE SENATE AND THE HOUSE.

A SOLUTION TO THE PROBLEM WHICH SHOULD RECONCILE ALL THE RELEVANT FACTORS INVOLVED WOULD ALSO, IN MY JUDGMENT, FACILITATE THE CONTINUED LONG-TERM OPERATION OF THE ATLANTIC FLEET WEAPONS RANGE AND THE FLEET MARINE FORCE TRAINING AREA.

ACCORDINGLY, I HAVE DECIDED IT WOULD BE IN THE LONG-RANGE INTEREST OF THE VARIOUS PARTIES TO MOVE THE CURRENT NAVY TRAINING ACTIVITIES BY JULY 1, 1975 FROM THE CULEBRA COMPLEX EAST OF PUERTO RICO TO THE UNINHABITED ISLANDS OF DESECHEO AND MONITO OFF THE WESTERN COAST OF PUERTO RICO, PROVIDED:

1. THAT THE CONGRESS AUTHORIZES AND APPROPRIATES THE FUNDS REQUIRED, AND

2. THAT A SATISFACTORY OVERALL ARRANGEMENT CAN BE WORKED OUT WITH THE GOVERNMENT OF PUERTO RICO FOR CARRYING OUT THE PROPOSED MOVE AND FOR ENSURING THE LONG TERM CONTINUATION OF THE ATLANTIC FLEET WEAPONS RANGE AND THE FLEET MARINE FORCE TRAINING AREA

UNTIL THESE PROVISIONS ARE MET AND THE REQUIREMENTS OF SECTION 102(2)C OF THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 ARE SATISFIED, CURRENT NAVY READINESS TRAINING IN THE CULEBRA COMPLEX MUST CONTINUE.

DISTR.

UNCLASSIFIED 252128Z MAY 73

UNCLASSIFIED

PAGE 06 OF 06 — 3201

I HAVE INFORMED SECRETARY OF DEFENSE-DESIGNATE, JAMES E. SCHLESINGER, OF THIS DECISION. UNQUOTE

2A. THE SECRETARY OF DEFENSE TRANSMITTED THE FOL MEMORANDUM TO THE SECRETARY OF THE NAVY ON 24 MAY 73: QUOTE

AS YOU KNOW, DURING MY CONFIRMATION HEARINGS BEFORE THE SENATE ARMED SERVICES COMMITTEE IN JANUARY, I INDICATED THAT I WOULD LOOK INTO THE CULEBRA SITUATION. IN KEEPING THIS PLEDGE, I HAVE REVIEWED THE LENGTHY HISTORY OF THIS PROBLEM AND, IN PARTICULAR, THE VIEWS OF THE DEPARTMENT OF THE NAVY.

IN MY JUDGMENT, IT WOULD BE IN THE LONG-RANGE INTEREST OF THE DEPARTMENT OF DEFENSE TO MOVE THE CURRENT NAVY TRAINING ACTIVITIES BY JULY 1, 1975, FROM THE CULEBRA COMPLEX TO THE ISLANDS OF DESECHEO AND MONITO, PROVIDED:

1. THAT THE CONGRESS AUTHORIZES AND APPROPRIATES THE FUNDS REQUIRED; AND

2. THAT A SATISFACTORY OVERALL ARRANGEMENT CAN BE WORKED OUT WITH THE GOVERNMENT OF PUERTO RICO FOR CARRYING OUT THE PROPOSED MOVE AND FOR INSURING THE LONG-TERM CONTINUATION OF THE ATLANTIC FLEET WEAPONS RANGE AND THE FLEET MARINE FORCE TRAINING AREA.

DISTR:

UNCLASSIFIED 252128Z MAY 73

JOINT [illegible] AGEFORM

UNCLASSIFIED

0 0						3201	

UNTIL THESE PROVISIONS ARE MET, AND THE REQUIREMENTS OF SECTION 1022C OF THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 ARE SATISIFIED, CURRENT NAVY ACTIVITIES IN THE CULEBRA COMPLEX MUST CONTINUE.

I REALIZE THAT THIS DECISION MAY CREATE CERTAIN OPERATIONAL DIFFICULTIES, BUT AM CONFIDENT THAT THESE WILL BE OF SHORT-TERM NATURE AND CAN BE ALLEVIATED BY CAREFUL PLANNING AND ADJUSTMENT OF ATLANTIC FLEET REQUIREMENTS.

IT WOULD BE APPRECIATED IF YOUR TIME-PHASED PLAN FOR IMPLEMENTING THIS DECISION WERE SUBMITTED TO THE SECRETARY OF DEFENSE BY JULY 1, 1973.

YOU ARE ALSO REQUESTED TO KEEP HIM CURRENTLY INFORMED OF THE PROGRESS BEING MADE. UNQUOTE.

3. TASKING FOR THE FORMULATION OF A TIME-PHASED IMPLEMENTATION PLAN FOR THE RELOCATION FROM THE CULEBRA COMPLEX TO DESECHEO AND MONITO WILL BE PROMULGATED BY CNO MESSAGE [illegible].

VISTA:

COMMONWEALTH OF PUERTO RICO

OFFICE OF GOVERNOR

La Fortaleza, San Juan

[SEAL]

June 20, 1975

The Honorable James R. Schlesinger
Secretary of Defense
The Pentagon
Washington, D.C. 20301

Dear Mr. Secretary:

Puerto Rico has long considered the conduct of naval weapons training on the tiny, inhabited Island of Culebra and on the nearby Culebra Cays a serious threat to the health, safety and general welfare of the inhabitants of Culebra. For many years we have sought permanent termination of this training. Now, due in no small measure to the splendid, constructive role of your staff, we are on the verge of achieving peace and tranquility for the residents of Culebra and relocation of Navy training to a suitable, uninhabited site. I am delighted to be able to proffer in this letter a second offer by Puerto Rico relating to an uninhabited site, but first, in order to place this offer in proper perspective, I would like to review briefly the recent history of executive and legislative actions in regard to Culebra and Puerto Rico's efforts to assist the United States Navy in relocating this training.

When he became Secretary of Defense the Honorable Elliot L. Richardson fulfilled a commitment made during the course of his confirmation hearings to conduct a thorough review of the policy of the Department of Defense on the Culebra question. This review culminated

in Secretary Richardson's decision on May 24, 1973, that:

> "it would be in the long-range interest of the various parties to move the current Navy training activities by July 1, 1975 from the Culebra complex east of Puerto Rico to the uninhabited islands of Desecheo and Monito off the western coast of Puerto Rico, provided:
>
> 1. That the Congress authorizes and appropriates the funds required, and
>
> 2. That a satisfactory overall arrangement can be worked out with the Government of Puerto Rico for carrying out the proposed move and for ensuring the long term continuation of the Atlantic Fleet Weapons Range and the Fleet Marine Force training area."

In response to a question raised during the course of the June 18, 1973, Senate confirmation hearings on your nomination to serve as Secretary of Defense you stated:

> "Secretary Richardson informed me of his decision on Culebra before he announced it, and I accept it as a policy designed, in Secretary Richardson's words, to 'facilitate the continued long-term operation of the Atlantic Fleet Weapons Range and the Fleet Marine Force training area.'
>
> The Department will work with the Congress and the Commonwealth of Puerto Rico to jointly meet the conditions upon which Secretary Richardson's decisions was [sic] predicated."

The first condition of the Defense Department policy enunciated by Secretary Richardson and reaffirmed by you was met when the Military Construction Authorization Act, 1974,[1] and the Military Construction Appro-

---

[1] Pub. L. No. 93-166 § 204, 87 Stat. 668-69 (1973).

priations Act, 1974[2] were approved on November 29, 1973, and on December 20, 1973, respectively. In those acts, Congress authorized and appropriated $12 million for the relocation of the training being conducted at the Culebra complex, subject to the conditions expressed in the authorizing act:

> "(b) The relocation of such operations from the northwest peninsula of the island of Culebra is expressly conditioned upon the conclusion of a satisfactory agreement to be negotiated by the Secretary of the Navy, or his designee, with the Commonwealth of Puerto Rico and reported to the Committees on Armed Services of the Senate and the House of Representatives prior to execution of such agreement. The agreement shall provide, among other things, that the Commonwealth of Puerto Rico shall insure that (1) Commonwealth lands suitable for carrying out operations of the type referred to in subsection (a) will be made available for the long term continued use of the Atlantic Fleet Weapons Range and Fleet Marine Forces training areas by the Navy, including, but not limited to, present areas and facilities on the island of Vieques, and (2) any proposed facility or activity which would interfere with the Navy training mission will not be undertaken, including the proposed deep water super-port on the island of Mona, in the event that such agreement includes the use by the Navy of such island or the area adjacent to such island.
>
> (c) Notwithstanding any other provision of law, the present bombardment area on the island of Culebra shall not be utilized for any purpose that would require decontamination at the expense of the United States. Any lands sold, transferred, or otherwise disposed of by the United States as a result of

---

[2] Pub. L. No. 93-194, 87 Stat. 766 (1973): *See* H. Rep. No. 93-693 (Comm. of Conference).

> the relocation of the operations referred to in subsection (a) may be sold, transferred, or otherwise disposed of only for public park or public recreational purposes."

The second condition prescribed by Secretary Richardson as well as the additional conditions imposed by Congress, were satisfied on March 7, 1974. On that date, I wrote a letter to the Honorable John W. Warner, then Secretary of the Navy, in which I stated that:

> "My Government is committed, without qualification, to support the transfer of Navy operations from Culebra to the uninhabited Islands of Desecheo and Monito."

This reiterated a commitment I personally made to Secretary of Defense Elliot Richardson, to members of the House Armed Services Committee on November 8, 1973, during a special appearance I made before the House conferees on the Military Construction Authorization Act of 1974 at the gracious invitation of the Chairman, Congressman Edward Hebert, and to Secretary Warner, himself, in an earlier letter dated November 26, 1973.

In this same letter of March 7, 1974, I acceded fully to the statutory requirements of the Military Construction Authorization Act of 1974, including making available for Navy training those Commonwealth lands Secretary Richardson and you found "suitable for carrying out operations of the type," that was to be relocated from Culebra and the Culebra Cays, the very same lands that were specifically contemplated in the acts of Congress. Indeed, I went beyond the strict letter of the law by offering portions of the island of Mona in addition to the island of Monito:

> "Accordingly, and in conformity with last year's federal Culebra legislation, the Commonwealth of Puerto Rico hereby agrees to make available to the

United States Navy for the long-term continued use of the Atlantic Fleet Weapons Range and Fleet Marine Force Training Area by the Navy: (1) the island of Monito and portions of the island of Mona reasonably required to facilitate weapons training at the island of Monito relocated from the Culebra complex, and (2) present areas and facilities on the island of Vieques for continuation of training now conducted there. I understand that Desecheo now is in federal ownership and available from the property inventory of General Services Administration for selection by the United States Navy.

The Commonwealth Government hereby agrees further that it will not undertake any proposed facility or activity which would interfere with the Navy training mission. Specifically including construction of the proposed deep water superport on the island of Mona if this project would interfere with the Navy training mission at Desecheo and Monito."

At the end of my letter of March 7, 1974, I expressed my hope and intention that:

"my letter signed today, together with whatever transmittal letter you wish to send, will constitute the 'satisfactory agreement' between the Navy and the Commonwealth of Puerto Rico required to be reported to the Committees on Armed Services of the Senate and the House of Representatives and to be reported by the Secretary of Defense to the Committees on Appropriations of the Senate and the House of Representatives. If, however, you require any additional action on my part to effect the relocation of the Culebra weapons training complex, I am at your disposal and hope we can expedite this transfer in every way possible."

Secretary Warner expressed his desire for a formal written agreement detailing the commitment contained in my letter of March 7, 1974. Immediately I designated

my representative to assist in this undertaking. Beginning with my letter of March 7, 1974, and throughout the period that followed, Puerto Rico continuously and strenuously urged the Navy to provide whatever form of written agreement it desired to expedite the formal conclusion of the negotiations called for by the Culebra legislation, but no draft agreement was ever submitted to Puerto Rico by the United States Navy. At no time did the discussions that ensued produce any request of Puerto Rico that was not fully satisfied. Implicitly acknowledging this fact and the suitability of the Commonwealth lands offered for carrying out the training operations that were to be relocated from Culebra and the Culebra Cays, the Navy issued a press release on April 2, 1974, announcing that it had reached "substantial agreement" with Puerto Rico on the transfer of Navy training "from the Culebra complex to the islands of Desecheo and Monito."

On May 8, 1974, the Navy reversed itself and declined to accept Puerto Rico's offer of the site you and your predecessor specified—the site contemplated by Congress at the time of the enactment of the Culebra legislation—and temporarily suspended negotiations as a result of perceived "implications that construction of a weapons range in the Mona passage (adjacent to Desecheo and Monito) would have on the integrity of our negotiating position on uninhibited transit through straits," pending further review of this question by the Under Secretary's Committee of the National Security Council.

Although I understand that this decision was based on the political judgment of the United States representatives at the Third United Nations Conference on the Law of the Sea regarding the negotiating ambience at this meeting, at the time I was advised by counsel who extensively researched the question that, from a strictly legal standpoint, neither existing international law nor then seriously proposed changes in international law impeded or threatened to impede the contemplated use of Monito and Desecheo by the Navy.

On June 5, 1974, the United States Senate unanimously approved the following amendment to what became the Department of Defense Appropriation Authorization Act, 1975:

> "Notwithstanding any other provision of law, no funds contained in this or any other Act shall be expended by the Department of the Navy for training operations at the Culebra complex involving the firing of any shells, missiles, or other projectiles from ships or the dropping of any bombs, strafing, firing of rockets or missiles, or the launching of any other projectiles from aircraft at Culebra or at any keys within three nautical miles thereof after December 31, 1975."

While this amendment was under consideration in a conference committee, and after receiving a study and recommendations from the Under Secretary's Committee of the National Security Council, the President of the United States decided on June 22, 1974, that:

> "—weapons training activities on Culebra should be terminated by July 1, 1975,
>
> —weapons training on the Culebra Cays should cease as soon after July 1, 1975 as possible, but in no case should the training be conducted on the Cays later than December 31, 1975."

The President instructed you to select an alternative site for training activities whether or not within Puerto Rico but specified, however, that "the selection of the new site, if it is in Puerto Rico, will be contingent on its being acceptable to the Commonwealth."

As you will recall, simultaneously with our joint announcement in Washington and San Juan of the President's decision, we jointly announced the formation of a Commission to assist us in implementing this decision. Although Puerto Rico already had agreed to provide the alternative site originally designated by your predecessor and reaffirmed by you—the site Congress clearly had

in mind in enacting the Culebra legislation—and Puerto Rico otherwise satisfied all pre-conditions to the relocation of the Culebra training, I instructed the representatives of Puerto Rico on the Joint Commission to spare no effort in seeking out additional new alternatives to facilitate the Navy's relocation even if this went clearly beyond the statutory requirement.

I am satisfied and I hope you are as well that our Commission worked with great diligence and dedication to provide a relocation site the Navy would find more to its liking than the site originally selected by your predecessor. After a thorough and conscientious review of possible alternative sites in Puerto Rico additional to the site already offered, the Commission concluded that no site in Puerto Rico is acceptable for this purpose because no other uninhabited site could be identified in our densely populated island.

I am delighted to report, however, that Puerto Rico has succeeded not only in identifying a most promising uninhabited potential relocation site—Dog Island—but on April 17, 1975, following extensive negotiations, the Puerto Rico Land Administration executed an agreement with the private owners of Dog Island conferring an option to take a forty year lease on this island subject to the consent of the United Kingdom, the United States and the Council of Anguilla for use by the United States Navy as a weapons training site. In this agreement it is expressed to be the intention of the Puerto Rico Land Administration:

> "to assign its right hereto to the United States Navy or the Department of Defense of the United States of America or the United States Government or a company controlled by any or all of the foregoing, to make available to the United States Navy an additional alternative training site to which it can relocate its training operations conducted at Culebra and the keys adjacent thereto with a view to the option granted herein being exercised by and the lease being granted to the United States Navy

or the Department of Defense of the United States of America or the United States Government or a company controlled by any or all of the foregoing."

Considerable effort went into negotiating this agreement and the accompanying lease. In addition, representatives of Puerto Rico have expended great effort in perfecting Puerto Rico's interest in Dog Island by obtaining various directoral and shareholder ratifications, the execution of other ancillary corporate agreements and documents and by obtaining a detailed legal opinion on questions of Anguillan law. I note with gratitude the successful efforts of the Defense Department and State Department in ongoing discussions with the United Kingdom to make the Dog Island site the very real option it is today.

Puerto Rico is prepared to assign its interest under the agreement conferring an option to take a lease to the United States Department of Defense or any appropriate entity designated by the Secretary of Defense or, if in your judgment it would better serve the interest of the United States and you would prefer, Puerto Rico is prepared to relinquish entirely its interest under the agreement conferring an option to take a lease so that the Dog Island site can be obtained exclusively in the context of ongoing government to government discussions between the United States and the United Kingdom.

Enclosed for your consideration in making this decision are conformed copies of the agreement of April 17, 1975, conferring an option to take a lease and additional pertinent documentation obtained by Puerto Rico.

I want you to know that I deeply appreciate your assistance in bringing this sensitive and difficult problem to a mutually satisfactory conclusion and especially the dedicated efforts of Mr. Stuart French and Mr. Pedro Sanjuan.

Cordially yours,

/s/ Rafael Hernández-Colón
RAFAEL HERNANDEZ-COLON
Governor

JOINT MESSAGEFORM

DTG: 041550Z03 XG XG 1 AAAA

FROM: CNO WASHINGTON DC

TO: CINCLANTFLT NORFOLK VA

INFO COMCARIBSEAFRON ROOSEVELT ROADS PR

~~C O N F I D E N T I A L~~ SEPECAT EXCLUSIVE //N00002//

FOR ADM COUSINS INFOR RADM RAMAGE FROM HOLLOWAY

CULEBRA NEGOTIATIONS (U)

A. CINCLANTFLT 191535Z FEB 75

B. CINCLANTFLT 191546Z FEB 75

1. SET SUMMARY - THE CULEBRA ISSUE HAS BECOME, APPARENTLY, A "SAVE VIEQUES" PROBLEM WITH TWO DIVERGENT VIEWS ON THE SOLUTION. OSD REPRESENTATIVES BELIEVE RELOCATION OF CULEBRA TRAINING TO DOG ISLAND MAY AVOID A CONFLICT OVER VIEQUES WHILE NAVY MAINTAINS THIS EVENT MIGHT GIVE THE COMMONWEALTH LEVERAGE TO REMOVE EXISTING TRAINING FROM VIEQUES. DOG ISLAND IS UNDESIRABLE OPERATIONALLY AND COST WISE, AND CONTINUING TO DISCUSS IT WITH BRITISH IS RISKY, BUT ALTERNATIVE OF PRESSING OSD AND CONGRESS TO ACCEPT VIEQUES AS SOLUTION AT THIS TIME IS WORSE. END OF SUMMARY.

2. SET THE CULEBRA ISSUE APPEARS TO BE REACHING ANOTHER TURNING POINT AS YOUR MESSAGE, REFERENCE (A) NOTES. YOUR VIEWS ON THE

DRAFTER: 40 SG/RELEASER OO

OO 09 04 NCSC 06 05 03

D. L. MCCORVEY, JR. / 4056,

X55065, 24 FEB 75

SPECIAL INSTRUCTIONS

405 40 06 03

408 04 05

RELEASER: TYPED NAME, TITLE, OFFICE SYMBOL AND PHONE / SIGNATURE

SECURITY CLASSIFICATION

DATE TIME GROUP

DD FORM 1 JUL 73 173 /OCR/ S/N 0102-014-6630 1633

SUBJECT ARE MUCH APPRECIATED AND ARE RIGHT ON TARGET. OUR COMMON GOAL WITHIN NAVY IS THE UNENCUMBERED RETENTION AND USE OF THE VIEQUES RANGES.

3. (C) TWO DIVERGENT VIEWS EXIST ON THE LONG TERM USE OF VIEQUES.

A. OSD VIEW REPORTEDLY SUPPORTED BY CONGRESSIONAL COMMITTEES (ARMED SERVICES AND INTERIOR) AND THE WHITE HOUSE DOMESTIC COUNCIL IS THAT RELOCATION OF CULEBRA TRAINING TO VIEQUES WOULD CREATE A "VIEQUES" PROBLEM WHICH WOULD ULTIMATELY RESULT IN THE LOSS OF VIEQUES. THEREFORE, AT LEAST A TOKEN RELOCATION TO DOG ISLAND IS NECESSARY TO RELIEVE THIS PRESSURE.

B. NAVY VIEW IS THAT RELOCATION TO DOG ISLAND WITH THE ASSISTANCE OF THE COMMONWEALTH WOULD PROVIDE THE WEDGE THE COMMONWEALTH HAS SOUGHT TO ULTIMATELY RELOCATE NAVY AND POSSIBLY MARINE CORPS TRAINING FROM VIEQUES AS WELL.

4. (C) THERE IS LOGIC IN EACH VIEW BUT LITTLE HARD EVIDENCE AVAILABLE TO SUPPORT OR DEFEND EITHER. IT IS GENERALLY AGREED THAT WHEN THE COMMONWEALTH FINDS NO ALTERNATIVE RTO RELOCATION TO VIEQUES, THE PROSPECTS OF SUCH A SETTLEMENT SHOULD BE ENHANCED.

5. (C) DOG ISLAND IS UNDERSTOOD BY ALL TO BE ECONOMICALLY AND

DISTR:

DRAFTER TYPED NAME, TITLE, OFFICE SYMBOL, PHONE & DATE

SPECIAL INSTRUCTIONS

NO

RELEASER: TYPED NAME, TITLE, OFFICE SYMBOL AND PHONE

SIGNATURE

SECURITY CLASSIFICATION: CONFIDENTIAL

DATE TIME GROUP

DD FORM 1 JUL 73 173 (OCR)

PAGE | CENTER OR INITIATE RELEASER TIME | IF | CLASS | CIC | FOR MESSAGE C | COMMUNICATIONS PERSONNEL ONLY DATE/TIME | | |

DTG

MESSAGE TEXT OR INSTRUCTIONS

OPERATIONALLY UNDESIRABLE COMPARED TO VIEQUES. THERE IS, HOWEVER, A REASONABLE EXPECTATION THAT THE BRITISH WILL BE UNABLE TO DELIVER IN THE END. WITH THIS EXPECTATION, WE ARE NOT OBJECTING TO EXPLORATORY DISCUSSIONS OSD AND STATE HAVE INITIATED WITH THE BRITISH--ALWAYS WITH THE CAVEAT THAT A DETERMINATION OF TECHNICAL FEASIBILITY OF THE PROPOSAL REQUIRES ON-SITE SURVEYS, ENVIRONMENTAL ASSESSMENTS OF THE SITE AND ADJACENT ISLANDS, AND PRELIMINARY DESIGN STUDIES. BASED ON THE COMMENTS OF REFERENCE (D), WE WILL PRESS FOR A SIX MONTH CONSULTING CONTRACT STUDY OF DOG ISLAND TO SOLVE THE FEASIBILITY QUESTION IF AND WHEN THE BRITISH SOLVE THE ANGUILLA INDEPENDENCE PROBLEM.

THE INFORMATION PREVIOUSLY PROVIDED ON DOG ISLAND SHOULD BE SUFFICIENT FOR THESE PRELIMINARY DISCUSSIONS.

6. IF TALKS WITH THE BRITISH CONFIRM THAT DOG ISLAND IS STILL AN ALTERNATIVE, WE WILL BE FACED WITH THE DIFFICULT TASK OF CONVINCING OSD THAT RELOCATION TO DOG ISLAND IS SO UNACCEPTABLE THAT THE DEFENSE DEPARTMENT MUST REPORT TO THE CONGRESS THAT THE NEGOTIATIONS

DISTR:

DRAFTER TYPED NAME, TITLE, OFFICE SYMBOL, PHONE & DATE | SPECIAL INSTRUCTIONS

No

RELEASER | TYPED NAME, TITLE, OFFICE SYMBOL AND PHONE

SIGNATURE | SECURITY CLASSIFICATION | DATE TIME GROUP

DD FORM 1 JUL 73 173 /OCR1

S/N 0155-00-L-6390

JOINT MESSAGEFORM

STAFF	DTG	PRECEDENCE	CLASS	EIC	FOR MESSAGE CENTER USE ONLY
06 OF 04					

BOOK — MESSAGE TEXT OR INSTRUCTIONS

ARE DEADLOCKED. FROM YOU HAVE NOTED, HOWEVER, THE LONGER WE DISCUSS DOG ISLAND AND THE MORE POLITICALLY FEASIBLE IT APPEARS, THE MORE DIFFICULT WOULD BE TO TAKE THIS COURSE OF ACTION.

7

WITH THIS DEVELOPMENT, IT APPEARS ADVANTAGEOUS TO CONTINUE OUR CURRENT COURSE OF ACTION (OR INACTION) FOR THE PRESENT.

8. (U) WARM REGARDS.

GDS 81

DISTR:

DRAFTER TYPED NAME, TITLE, OFFICE SYMBOL, PHONE & DATE | SPECIAL INSTRUCTIONS

RELEASER — TYPED NAME, TITLE, OFFICE SYMBOL AND PHONE

SIGNATURE | SECURITY CLASSIFICATION: ~~CONFIDENTIAL~~ | DATE TIME GROUP

DD FORM 1 JUL 73 173 (OCR)

CRB 332

April 8, 1971

The Honorable Melvin R. Laird
Secretary of Defense
The Pentagon
Washington, D.C.

Dear Mr. Secretary:

In a very personal way I want to express to you my appreciation of the results achieved with respect to Culebra last week. It has all turned out very well and all have gained. The Culebran people and the citizens of Puerto Rico have seen that the Administration in Washington has heeded their concern. The Navy, with its program for Culebra and the conversion to dud ammunition, has enhanced its standing considerably, so much so that it is a strong possibility that the Culebrans will not want the Navy to leave after the end of 1972. Needless to say, all of this is not lost on our Central and South American neighbors who have been intently watching the Culebran matter and awaiting its outcome. And finally, those of us in the Government here in Puerto Rico can now devote our attention to other pressing matters, for this problem, which has occupied so much of our attention for so long, is now laid to rest.

As you know, it might, in my judgment, have been otherwise. The pitfalls were avoided, however, and I am especially appreciative of your understanding and response to my convictions on these points. I do not know that such an excellent result would have been reached had someone else been Secretary of Defense.

Because of the Culebran achievement, the future is visibly brightened here in Puerto Rico and I anticipate no recurrence or transference of our problem. In any event, I am now able to support the Navy's needs on behalf of national defense from a much stronger position. The social problem has been set aside and the Navy's

true role and importance in Puerto Rico—both very great—are no longer obscured.

As always, I enjoyed talking with you and I look forward to a renewal of the pleasure at an early time. You are a good friend and, much more important, a true friend of Puerto Rico.

With highest regard,

Sincerely yours,
LUIS A. FERRE
Governor

CRB 417

1. "Specify the kinds of weapons range activities conducted on Vieques for each year 1968 through the current month."

   a. "State the number of hours, rounds fired, live rounds fired, troops participating in, and the number of days of artillery practice on Vieques for each year 1968 through the current month;"

   b. "State the number of hours, rounds fired, live rounds fired, ships participating in, and the number of days of Naval Gunfire Support ("NGFS") on Vieques for each year 1968 through the current month;"

   c. "State the number of hours, rounds fired, live rounds fired, sorties flown, jet aircraft participating in, and the number of days of *air-to-ground* target practice on Vieques for each year 1968 through the current month;"

   d. State the total number of hours for each year 1968 through the current month, during which military target practice on Vieques occurred after 8:00 p.m. or before 8:00 a.m.;"

   e. "State the number of air-to-ground and ship missiles fired on Vieques for each year 1968 through the current month."

ANSWER:

1A Arty Vieques	Last 6 mo. 1973	1974	1975	1976	1977	First 6 mo. 1978
Hours	324.1	387.9	272.7	289.0	39.6	132.0
Rounds	2297	29080	13266	8367	225	
Troops						
Days	20	83	24	26	5	6

1B "NGFS" Vieques	Last 6 mo. 1973	1974	1975	1976	1977	First 6 mo. 1978
Hours	202.5	644.4	669.4	715.0	1016.9	559.7
Rounds	2099	7206	8265	7040	8700	3816
Ships	33	91	74	73	97	39
Days*	39	95	85	88	115	49
1C A/G Vieques						
Hours	137.9	159.3	362.6	484.5	1518.1	819.9
Rounds	33779	49052	59219	30801	107,206	100,196
Sorties Jet A/C	861	309	1638	1141	3438	1924
Days*	42	38	92	92	100	63

(SOURCE: RUR 7/73-6/78)

*(SOURCE: SUR)

1D

Information not available

1E

Information not available

NOTE: Certain items/time periods were omitted from the answers to Question 1 due to lack of complete, accurate information.

23. "State the total tonnage of bombs, missiles or other ordnance aimed at Vieques or its vicinity each year since January 1, 1968, through the current month."

ANSWER:

1 July 73 - 31 Dec. 73	(6 mo.)	460.86
1974	(12 mo.)	1065.22
1975	(12 mo.)	1332.51
1976	(12 mo.)	1246.96
1977	(12 mo.)	2402.28
1 Jan. 78 - 30 June 78	(6 mo.)	1942.68

(SOURCE: RUR 7/73-6/78)

a. "state the metal and chemical composition of such ordnance. Identify and submit copies of all documents discussing such composition."

ANSWER:

EOD A/G ORD description list attached.

CRB 419

U.S. NAVY ATLANTIC FLEET WEAPONS
TRAINING FACILITY
FIVE YEAR DEVELOPMENT PLAN
FYS 78-82

* * * *

5-3.1(U) The Inner Range capabilities have been severely restricted as a result of the Navy/Puerto Rican Government Agreement emanating from the political controversy involving Culebra. The Inner Range of the LANFPLT WPNIRAFAC originally consisted of the islands of Vieques and Culebra and adjacent cays. As a result of the Agreement between the Government of Puerto Rico and the Navy, several air-to-ground targets and the strafing range of Culebrita Island have been decommissioned. Based on the agreement 4.5 square acres of Culebrita have been retained for use as site for electronic warfare emitters. The portion of the range consisting of the island of Culebra and adjacent cays has ceased to provide training support to the Fleet inasmuch as Naval Gunfire Support (NGFS) exercises at Culebra and Air-to-Ground weapons training on adjacent cays were discontinued effective 30 September 1975. Notwithstanding these limitations the Inner Range continues to provide the targets and facilities for support of VA, VF, VS, VMA, VMF, VMO, VMFA foreign air units, air-to-ground weapons training requirements and naval gunfire support (NGFS) exercises on a more restricted scheduling basis. Some Development Test and Evaluation (DT&E) efforts have also been supported on the Inner Range. Projected Inner Range usage and service requirements for fiscal years 1978-82 are contained in references (d), (j), (k), (l), and (s). Therefore as of September 1975, the total targets no longer available for training are:

1. Shark Rock (Roca Tiburon)—inert practice ordnance.
2. Palada Cays (Cayos Geniqui)—inert practice ordnance.
3. Ladrone Cay—Day and night air-to-ground target.
4. Culebrita Island—strafing targets on west end of island.
5. Aqua Cay Land Target—Day air-to-ground target.
6. Aqua Cay Hydroscore Target—Day air-to-ground target.
7. Aerial Mining Range-East—Mining exercises, inert ordnance.
8. Aerial Mining Range-West—Mining exercises, inert ordnance.
9. Target 14—Air-to-Ground exercises, practice ordnance and napalm.
10. Fungy Bowl (Alcarraza)—High and low level radar bombing. Conventional ordnance.
11. Twin Rocks * * * over-the-shoulder and dive bombing. Air-to-surface missiles.
12. Northwest peninsula—shore bombardment.
13. Cross Cay—Day and night air-to-ground target.

5-3.2(U) Although targets have been installed at Vieques to replace the loss of the Culebra targets, training limitations are to be expected due to the requirement that scheduling of air-to-ground, close air support, and NGF exercises must be coordinated with the Marine Corps Command by integrating operations scheduling and other controls.

5-3.3(U) The present facilities at Vieques for scoring NGFS and air-to-ground missions are, at best, marginal. The observation post on Cerro Matias consists of a

Butler building and other temporary structures and facilities. Improvement of the scoring and target capability includes a Ship Positioning System, Acquisition Radar, Microwave, Profile Tracking System, TV Bomb/Rocket Scoring System, Pathfinder Radar, and augmented communications and power generating facilities. This improvement program was initiated during CY-74 and will continue through CY-79.

CRB 420

UNITED STATES NAVY ATLANTIC FLEET WEAPONS TRAINING FACILITY FIVE YEAR DEVELOPMENT PLAN FY's 79-83

* * * *

1. (U) The Inner Range capabilities have been severely restricted as a result of the Navy/Puerto Rican Government Agreement emanating from the political controversy involving Culebra. The Inner Range of the LANTFLTWPNTRAFAC originally consisted of the islands of Vieques and Culebra and adjacent cays. As a result of the Agreement, between the Government of Puerto Rico and the Navy, several air-to-ground targets and the strafing range off Culebrita Island have been decommissioned. Based on the agreement 4.5 square acres of Culebrita have been retained for use as site for electronic warfare emitters. The portion of the range consisting of the island of Culebra and adjacent cays has ceased to provide training support to the Fleet, inasmuch as air-to-ground weapons training on adjacent cays was discontinued effective 30 September 1975. Notwithstanding these limitations, the Inner Range continues to provide the targets and facilities for support of: VA, VF, VS, VMA, VMF, VMO, VMFA, foreign air units and air-to-ground weapons training exercises on a more restricted scheduling basis. Some Development Test and Evaluation (DT&E) efforts have also been supported on the Inner Range.

2. (U) The total number of targets no longer available for air-to-ground training since September 1975 are:

a. Shark Rock (Roca Taburon)—inert practice ordnance.

b. Palada Cays (Cayos Geniqui)—inert practice ordnance.

c. Ladrone Cay—day and night air-to-ground target.

d. Culebrita Island—strafing targets on west end of island.

e. Agua Cay Land Target—day air-to-ground target.

f. Agua Cay Hydroscore Target—day air-to-ground target.

g. Aerial Mining Range-East—mining exercises, inert ordnance.

h. Aerial Mining Range-West—mining exercises, inert ordnance.

i. Target 14—air-to-ground exercises, practice ordnance and napalm.

j. Fungy Bowl (Alcarraza)—high and low level radar bombing, conventional ordnance.

k. Twin Rocks (Los Gemelos)—loft, over-the-shoulder and dive bombing; air-to-surface missiles.

l. Cross Cay—day and night air-to-ground target.

3. (U) Although targets have been installed at Vieques to replace the loss of the Culebra targets, training limitations are to be expected due to the requirement that scheduling of air-to-ground and close air support exercises must be coordinated with the Marine Corps Command by integrating operations scheduling and other controls.

4. (U) The present facilities of the Inner Range for scoring air-to-ground missions are at best, marginal. The observation post on Cerro Matias consists of a prefabricated metal type building and other temporary structures and facilities. Improvement of the scoring and target capability—other than the "in progress"—besides the Microwave, TV Bomb/Rocket Scoring System, Pathfinder Radar, and augmented communications includes the other Inner Range projects discussed in this section.

2-6.3(C) FLEET SUPPORT REQUIREMENTS (U)

2 (U) Projected Inner Range A/G Target Complex usage and service requirements for fiscal years 1979-83 are continued in references (c), (d), (g), and (l).

2-6.4(U) DEVELOPMENT GOALS (U)

1. (U) The development of the Inner Range is directed toward the attainment of the following goals:

a. Increased scoring accuracy with less operating personnel to satisfy requirements.

b. Increased automation to obtain remote scoring.

c. Increased realism in target presentation and tactical scenarios.

d. Increased training response to improved weapons.

e. Improved dynamic targets in the Close Air Support Zone.

f. Absorbtion of exercises formerly conducted on the Culebra Complex.

2. (U) During certain artillery fire missions conducted by the U.S. Marine Corps within the Surface Impact Area and/or the Close Air Support Zone, the OP is in the line of fire, thereby forcing all personnel to vacate the area. To avoid loss of stand-down time, endangering lives of personnel, and exposure of equipment, hardening of the site is required. Consequently, MILCON Project P-963: "Vieques Range Operations Center" is included in this FYDP for FY-80 funding.

3-1.2(U) LIMITATIONS

1. (U) The capabilities of the Inner Range to support NGF exercises were severely restricted as a result of the Navy/Puerto Rico Government Agreement emanating from the political controversy involving Culebra. As a result of this Agreement all NGF targets of the Culebra Complex were phased out. On 30 September 1975, the NW Peninsula on Culebra Island ceased to be a shore bombardment range.

2. (U) Although NGF targets have been installed at Vieques to replace the loss of the targets at Culebra, training limitations are to be expected in NGF exercises due to the scheduling of air-to-ground and close air support exercises that cannot be conducted concurrently with NGF exercises, and the need to coordinate all exercises

on the Inner Range with the USMC Command by integrating operations scheduling and other controls.

3. (U) The present facilities of the Inner Range for supporting NGF exercises are at best marginal. Buildings and structures are of a temporary nature and additional instrumentation is required. Aside of the Ship Position Location System, currently under installation, improvements to the NGF Target Complex—other than the "in progress" in microwave and communications—are required as discussed in the projects in this section.

3-1.3(C) FLEET SUPPORT REQUIREMENTS (U)

2. (U) Projected Inner Range NGF Target Complex usage and service requirements for FY's 1979-83 are contained in references (c), (e), (g), (h) and (l).

3-1.4(U) DEVELOPMENT GOALS (U)

1. (U) The development of the Inner Range Naval Gunfire Target Complex is directed toward the attainment of the following goals:

a. Increased scoring accuracy with less operating personnel to satisfy requirements.

b. Increased automation to obtain remote scoring.

c. Increased realism in target presentation and tactical scenarios.

d. Increased training response to improved weapons.

e. Absorbtion of exercises formerly conducted on the Culebra Complex.

2. (U) During certain artillery fire missions conducted by the U.S. Marine Corps within the Surface Impact Area and/or the Close Air Support Zone, the OP is in the line of fire, thereby forcing all personnel to vacate the area. To avoid loss of stand-down time, endangering lives of personnel and exposure of equipment, hardening of the site is required. Consequently MILCON Project P-963: "Vieques Range Operations Center" is included in this FYDP for FY-80 funding.

CRB 421

U.S. ATLANTIC FLEET
WEAPONS TRAINING FACILITY
FIVE YEAR DEVELOPMENT PLAN FYs 80-84

* * * *

1. (U) The Inner Range capabilities have been severely restricted as a result of the Navy/Puerto Rican Government Agreement emanating from the political controversy involving Culebra. The Inner Range of the LANTFLTWPNTRAFAC originally consisted of the islands of Vieques and Culebra and adjacent cays. As a result of the Agreement, between the Government of Puerto Rico and the Navy, several air-to-ground targets and the strafing range off Culebrita Island have been decommissioned. Based on the agreement, 4.5 square acres of Culebrita have been retained for use as site for electronic warfare emitters. The portion of the range consisting of the island of Culebra and adjacent cays has ceased to provide training support to the Fleet, inasmuch as air-to-ground weapons training on adjacent cays was discontinued effective 30 September 1975. Notwithstanding these limitations, the Inner Range continues to provide the targets and facilities for support of: VA, VF, VS, VMA, VMF, VMO, VMFA, foreign air units and air-to-ground weapons training exercises, although on a more restricted scheduling basis. Some Development Test and Evaluation (DT&E) efforts have also been supported on the Inner Range.

2. (U) The total number of targets no longer available for air-to-ground training since September 1975 are:

a. Shark Rock (Roca Tiburon)—inert practice ordnance.

b. Palada Cays (Cayos Geniqui)—inert practice ordnance.

c. Ladrone Cay—day and night air-to-ground target.

d. Culebrita Island—strafing targets on west end of island.

e. Agua Cay Land Target—day air-to-ground target.

f. Agua Cay Hydroscore Target—day air-to-ground target.

g. Aerial Mining Range-East—mining exercises, inert ordnance.

h. Aerial Mining Range-West—mining exercises, inert ordnance.

i. Target 14—air-to-ground exercises, practice ordnance and napalm.

j. Fungy Bowl (Alcarraza)—high and low level radar bombing, conventional ordnance.

k. Twin Rocks (Los Gemelos)—loft, over-the-shoulder and dive bombing; air-to-surface missiles.

l. Cross Cay—day and night air-to-ground target.

3. (U) Although targets have been installed at Vieques, training limitations are to be expected due to the requirement that scheduling of air-to-ground, NGFS and close air support exercises must be coordinated with the Marine Corps Command by integrating operations scheduling, and other controls.

* * * *

3-1.2(U) LIMITATIONS

1. (U) The capabilities of the Inner Range to support NGF exercises were severely restricted as a result of the Navy/Puerto Rico Government Agreement emanating from the political controversy involving Culebra. As a result of this Agreement all NGF targets of the Culebra Complex were phased out. On 30 September 1975, the NW Peninsula on Culebra Island ceased to be a shore bombardment range.

2. (U) Although NGF targets have been installed at Vieques, training limitations are to be expected in NGF exercises due to the scheduling of air-to-ground and close air support exercises that cannot be conducted concurrently with NGF exercises, and the need to coordinate all exercises on the Inner Range with the USMC Command by integrating operations scheduling and other controls.

3. (U) The present facilities of the Inner Range for supporting NGF exercises are at best marginal. Buildings and structures are of a temporary nature and additional instrumentation is required. Aside from the Ship Position Location System, recently installed, improvements to the NGF Target Complex—other than in microwave and communications—are required as discussed in the projects in this section.

3-1.3(C) FLEET SUPPORT REQUIREMENTS (U)

2. (U) Projected Inner Range NGF Target Complex usage and service requirements for FY's 1980-84 are contained in references (c), (d), (g), (h) and (i).

3-1.4(U) DEVELOPMENT GOALS (U)

1. (U) The development of the Inner Range Naval Gunfire Target Complex is directed toward the attainment of the following goals:

a. (U) Increased scoring accuracy with less operating personnel to satisfy requirements.

b. (U) Increased automation to obtain remote scoring.

c. (U) Increased realism in target presentation and tactical scenarios.

d. (U) Increased training response to improved weapons.

e. (U) Absorption of exercises formerly conducted on the Culebra Complex.

2. (U) During certain artillery fire missions conducted by the U.S. Marine Corps within the Surface Impact Area and/or the Close Air Support Zone, the OR is in the line of fire, thereby forcing all personnel to vacate the area. To avoid loss of stand-down time, endangering lives of personnel and exposure of equipment, hardening of the site is required. Consequently, MILCON Project P-963: "Vieques Range Operations Center" is included in this FYDP for FY-82 funding.

SUPREME COURT OF THE UNITED STATES

No. 80-1990

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

CARLOS ROMERO-BARCELO, ET AL.

ORDER ALLOWING CERTIORARI

Filed October 5, 1981

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 357715 678

Office-Supreme Court, U.S.
FILED
JUL 1 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1990

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CASPAR WEINBERGER ET AL.,
Petitioners,

v.

CARLOS ROMERO-BARCELO ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

HECTOR REICHARD DE CARDONA
Secretary of Justice

THOMAS R. LINCOLN
Department of Justice

GERARDO A. CARLO
Special Counsel to the Governor

JOHN A. HODGES
(Counsel of Record)

TIMOTHY L. HARKER
LAWRENCE WHITE
JEFFREY N. MARTIN

PEABODY, RIVLIN, LAMBERT & MEYERS
A Professional Corporation
1150 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 457-1000

Counsel for Respondents

Of Counsel

LEWIS A. RIVLIN
1150 Connecticut Ave., N.W.
Washington, D.C. 20036

July 1, 1981

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in ordering an injunction, limited as to scope and duration, for a continuous violation of the permit requirements of the Federal Water Pollution Control Act, which violation was in "utter disregard of the statutory mandate."

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
I. Introduction	1
II. Summary of Facts	3
III. Decisions of the Courts Below	5
REASONS FOR DENYING THE PETITION	7
I. The Petition Raises a Question that in All Likelihood Will Be Mooted by the Completion of the Administrative Process Concerning the Permit	7
II. The Ruling of the Court Below Does Not Conflict with Fourth Circuit Decisions Cited by the Navy	8
III. The First Circuit Applied Settled Principles of Federal Law in Enjoining the Navy's Violations of the Clean Water Act	10
IV. The Decision of the Court of Appeals is a Narrow, Fact-Specific Decision that Raises No Significant Question of Federal Law	15
V. Denial of the Navy's Petition Will Preserve the Fair and Equitable Relief Secured by Puerto Rico in the Court of Appeals	16
CONCLUSION	17

TABLE OF AUTHORITIES

CASES:	Page
Aluli v. *Rumsfeld*, Civ. Action No. 76-0380 (D. Haw.)	5
American Textile Manufacturers Institute, Inc. v. *Donovan*, —— U.S. ——, 49 U.S.L.W. 4720 (June 17, 1981)	13
Bethlehem Steel Corp. v. *Train*, 544 F.2d 657 (3d Cir. 1976), *cert. denied*, 430 U.S. 975 (1977)	12
Buscaglia v. *District Court of San Juan*, 145 F.2d 274 (1st Cir.), *cert. denied*, 323 U.S. 793 (1944)	12
Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402 (1971)	12
Consolidation Coal Co. v. *Costle*, 604 F.2d 239 (4th Cir. 1979), *rev'd sub nom., EPA* v. *National Crushed Stone Ass'n*, —— U.S. ——, 66 L.Ed. 2d 268 (1980)	8, 9
Cooper v. *Wisdom*, 440 F. Supp. 1027 (S.D. Fla. 1977)	10, 12
Cousins v. *Wigoda*, 409 U.S. 1201 (Rehnquist, Circuit Justice, 1972)	7
FTC v. *National Lead Co.*, 352 U.S. 419 (1957)	9
Jones v. *Lynn*, 477 F.2d 885 (1st Cir. 1973)	11
Lathan v. *Volpe*, 455 F.2d 1111 (9th Cir. 1971)	13
Milwaukee v. *Illinois*, —— U.S. ——, 49 U.S.L.W. 4445 (Apr. 28, 1981)	12
NLRB v. *Union Nacional de Trabajadores*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977)	9
National Wildlife Federation v. *Coleman*, 529 F.2d 359 (5th Cir.), *cert. denied sub nom., Boteler* v. *National Wildlife Federation*, 429 U.S. 979 (1976)	13
Natural Resources Defense Council, Inc. v. *Costle*, 568 F.2d 1369 (D.C. Cir. 1977)	12
Save Our Sound Fisheries Ass'n v. *Callaway*, 387 F. Supp. 292 (D.R.I. 1974)	10, 12
Standard Oil Co. of California v. *FTC*, 577 F.2d 653 (9th Cir. 1978)	9

TABLE OF AUTHORITIES—Continued

Page

State Water Control Board v. *Train*, 559 F.2d 921 (4th Cir. 1977) 8-9
Taggart v. *Weinacker's Inc.*, 397 U.S. 223 (1970) (per curiam) 7, 8
Tennessee Valley Authority v. *Hill*, 437 U.S. 153 (1978) 11, 12
United States v. *City and County of San Francisco*, 310 U.S. 16 (1940) 12, 13
United States v. *City of Painesville, Ohio*, 644 F.2d 1186 (6th Cir. 1981) 13-14
United States v. *Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1979) 11
United States v. *Gonzalez Vargas*, 558 F.2d 631 (1st Cir. 1977) 9
United States v. *Holland*, 373 F. Supp. 665 (M.D. Fla. 1974) 11
United States v. *United States Gypsum Co.*, 340 U.S. 76 (1950) 9

STATUTES:

Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* (1976 & Supp. III 1980)

—— § 1311 ..... 4, 10, 11, 12
—— § 1311(b)(1) 9
—— § 1323(a) 2, 7
—— § 1342 4
—— § 1343 4
—— § 1362(6) 4, 5
—— § 1362(7) 4
—— § 1362(8) 4
—— § 1362(12) 4
—— § 1362(14) 4, 5
—— § 1362(16) 4

OTHER AUTHORITIES:

2 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 92d Cong., 1st Sess. (1973) 11, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1990

CASPAR WEINBERGER ET AL.,
Petitioners,

v.

CARLOS ROMERO-BARCELO ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE[1]

I. Introduction

Carlos Romero-Barceló, the Governor of Puerto Rico, on behalf of Puerto Rico, the island municipality of Vieques, and the other respondents (referred to collectively as "Puerto Rico"), hereby opposes the petition for a writ of certiorari filed on behalf of the Secretary

---

[1] On May 28, 1981, Puerto Rico filed its own petition for a writ of certiorari to obtain review of other portions of the same decision of the United States Court of Appeals for the First Circuit. Romero-Barceló v. Weinberger, No. 80-2033. Puerto Rico's petition contained a brief statement describing the factual and procedural background of the case, and the Court is respectfully referred to that statement for details not repeated herein.

of Defense and officials of the Department of the Navy (referred to collectively as "the Navy"). Puerto Rico respectfully submits that the Navy's petition raises no significant questions of federal law that merit this Court's attention.

This case concerns the propriety of an injunction of limited scope and duration restraining the Navy from further violation of the Federal Water Pollution Control Act [2] in connection with intentional and accidental discharges of ordnance into the coastal waters of the inhabited island of Vieques. Both the trial court and the First Circuit Court of Appeals found that the Navy, by discharging bombs and shells into Puerto Rican coastal waters without first obtaining a National Pollution Discharge Elimination System (NPDES) permit from the Environmental Protection Agency, engaged in a continuing violation of the Clean Water Act.

The Navy does not dispute that conclusion. Instead, characterizing its conduct as a "technical" violation of the Clean Water Act [3]—a characterization specifically rejected by the Court of Appeals—the Navy asks this Court to review the remedy imposed by the Court of Appeals: an injunction prohibiting further bombing and shelling of coastal waters until the Navy either obtains the required permit under the Clean Water Act or, pursuant to Section 313(a) of the Act,[4] obtains a Presidential exemption from the permit requirement.

---

[2] 33 U.S.C. § 1251 *et seq.* (1976 & Supp. III 1980) (referred to hereinafter as the "Clean Water Act").

[3] *Cf.* Navy's Petition for a Writ of Certiorari, Appendix C, p. 162a. As used herein, the abbreviation "Navy Pet." refers to the Navy's petition for a writ of certiorari; the abbreviation "App." refers to the Appendices filed with that petition; and the abbreviation "C.A.J.A." refers to the Joint Appendix filed by the parties in the Court of Appeals.

[4] 33 U.S.C. § 1323(a) (Supp. III 1980).

II. Summary of Facts

This case arises out of the Navy's air-to-ground bombing and ship-to-shore shelling of the inhabited island of Vieques. Vieques is a small island approximately 20 miles long and an average of 4.5 miles wide. More than 8,000 people live on the island.

The Navy possesses title to approximately 76 percent of the island's land. Prior to 1970, the Navy conducted air-to-ground bombing and ship-to-shore shelling on the sparsely populated, nearby Puerto Rican island of Culebra. Naval land on Vieques was used principally for small-scale artillery training and amphibious exercises.

Between 1971 and 1975, the Navy methodically and clandestinely transferred Culebra bombing and shelling activities to Vieques.[5] As a result, the Navy tremendously intensified the level of weapons firing on Vieques. Between 1974 and 1977, the Navy increased by over *900 percent* the number of 500 (MK82), 1,000 (MK83) and 2,000 (MK84) pound bombs dropped on and around

---

[5] The clandestine nature of the Navy's decision to transfer training operations from Culebra to Vieques is apparent from documents produced by the Navy before trial. One confidential document revealed the Navy's awareness that the tempo of training operations on Vieques was a sensitive issue:

> It would seem *advantageous* to spread out the usage [on Vieques] somewhat so as to give more ships a chance to fire without increasing the *apparent* weekly tempo.

C.A.J.A. 1506 (emphasis added). The document also stated:

> With regard to Vieques, [Rear Admiral] Ward indicated that *we should be very careful not to appear increase our tempo of operations above that of previous yea. . . . .*

C.A.J.A. 1504 (emphasis added). An internal Naval communication in April, 1972, stressed that, due to the "extreme sensitivity" of any plan for relocating Culebra operations to Vieques, all Navy message traffic on the subject was to be "flagged limited distribution special handling." C.A.J.A. 1413.

Vieques.[6] Bombing, shelling, and other military activities have resulted in the discharge of millions of pounds of munitions and other pollutants into the coastal waters of Vieques, with damage to fragile coral reefs, seagrasses, and other marine organisms and habitats. By the Navy's own admission, the beaches and waters surrounding Vieques are now saturated with ordnance.[7]

The Navy was aware of the damage that would be inflicted on the marine environment of Vieques by the shift of Culebra training activities to that island. A report prepared for the Navy in 1972 warned that expanded range use on Vieques "would cause a subtle and adverse impact [on] the total marine environment of these waters." The report warned that coral reefs in Vieques coastal waters would be irreparably damaged. "Although much of the resulting ecological damage may be repaired by nature in time, some damage to coastal zones, and reef systems in particular, is irreparable." [8]

The Clean Water Act expressly prohibits the "discharge" of any "pollutant" from a "point source" into the "navigable waters" of the United States without a permit issued by the EPA or a state with an EPA-approved permit program.[9] The Act defines the term

---

[6] C.A.J.A. 1796-1824.

[7] C.A.J.A. 703-4, 757-60, 810-12, 1518-52, 1603-19. The extraordinary intensification of bombing and shelling activities on Vieques as Culebra sites were abandoned is graphically illustrated in the record. *See* C.A.J.A. 1782-1952. Items discovered in the waters of Vieques near the reefs include exploded and unexploded bombs and shells, practice ordnance, parachutes, parachute cables, flares, flaring casings, barges and other military vessels, machine gun rounds, bazooka rockets and many unidentifiable ordnance fragments.

[8] C.A.J.A. 284-85. At trial, the Navy's own witness testified that "[t]he fringing reefs on both sides of the north central cove . . . have been extensively bombed." C.A.J.A. 311.

[9] §§ 301, 402, 403, 502(6), (7), (8), (12), (14), (16), 33 U.S.C. §§ 1311, 1342, 1343, 1362(6), (7), (8), (12), (14), (16).

"pollutant" to include "munitions" and wrecked or discarded equipment. The term "point source" is defined to include vessels and other conveyances from which pollutants may be discharged.[10] Under the statutory scheme, shells, bombs and other ordnance discharged into the waters around Vieques are subject to the strictures of the Act.

The Navy is chargeable with knowledge of these requirements of the Act. In the words of the trial court, the language of the Act is "unambiguous."[11] Furthermore, in 1976, a lawsuit was commenced challenging Navy bombing and shelling activities on the island of Kahoolawe in Hawaii.[12] The complaint in that case asserted, among other things, that the Navy could not conduct ship-to-shore shelling and air-to-ground bombing without first obtaining an NPDES permit under the Clean Water Act.[13] Notwithstanding these facts and in utter disregard of the explicit command of the statute, the Navy neither sought nor obtained a permit from the EPA for bombing and shelling of the coastal waters of Vieques.

III. Decisions of the Courts Below

On March 1, 1978, Puerto Rico commenced this action against the Navy in the United States District Court for the District of Puerto Rico. Puerto Rico sought injunc-

---

[10] § 502(6), (14), 33 U.S.C. § 1362(6), (14).

[11] App. 80a.

[12] Aluli v. Rumsfeld, Civ. Action No. 76-0380 (D.Haw.).

[13] In its petition, the Navy untruthfully asserts that prior to the filing of Puerto Rico's complaint in 1978 nobody had ever contended that the Clean Water Act applied to the incidental release of ordnance into coastal waters. Navy Pet. 13. The Navy knows full well that it was sued in 1976 over the failure to obtain an NPDES permit for such activities. The Navy is being disingenuous, therefore, when it asserts to this Court that "the first inkling" it had "that anyone thought that a NPDES permit was required was the complaint which was filed in this suit [concerning Vieques]. . . ." *Id.*

tive relief until such time as the Navy complied fully with the Clean Water Act.[14]

On September 17, 1979, the trial court found that the Navy had violated and was continuing to violate the "unambiguous language" of the Act by discharging ordnance into the navigable waters of Vieques without an NPDES permit. The trial court refused, however, to enjoin Naval bombing and shelling during the time period required to obtain an NPDES permit.[15]

The Navy did not even bother to appeal from the ruling of the trial court that its conduct violated the Act. Indeed, its petition to this Court admits what has long been obvious: that "the literal language of the Clean Water Act covers inadvertent release of shells and bombs into the coastal waters of Vieques." [16]

On January 26, 1981, the Court of Appeals vacated the judgment of the trial court on the Clean Water Act and remanded with instructions to enter an order directing the Navy "to take all steps necessary to insure that no ordnance is discharged into the coastal waters of Vieques until such time as it obtains a NPDES permit." [17] The Court of Appeals ruled that the Navy's violation of the Act was not "technical" and that the Navy had "utterly disregarded the statutory mandate" by conducting bombing and shelling operations without first having obtained

---

[14] Puerto Rico sought relief for violation of other laws as well. *See* App. 55a-56a.

[15] App. 78a-86a, 165a.

[16] Navy Pet. 4, n.4. Nor did the Navy appeal with respect to the matter it mentions in passing (Navy Pet. 13), that Puerto Rico did not comply with a 60-day notice requirement. Nor could the Navy have so appealed. Puerto Rico long ago filed a motion in the district court to cure that alleged defect. The Navy did not oppose the motion and the district court granted it. (C.A.J.A. 164-171.) The Navy's mention of the 60-day notice matter in this Court is a red herring.

[17] App. 49a.

a permit.[18] The Court of Appeals also stated that the Navy could apply for a Presidential exemption from the permit requirement pursuant to 33 U.S.C. § 1323(a) if the injunction significantly interfered with Navy preparedness.

REASONS FOR DENYING THE PETITION

I. The Petition Raises a Question that in All Likelihood Will Be Mooted by the Completion of the Administrative Process Concerning the Permit.

After the Navy filed its petition with this Court, the EPA gave public notice of a draft NPDES permit and announced its tentative decision to issue that permit.[19] Were the Court to grant the Navy's petition, administrative processing of the Navy's application for an NPDES permit in all likelihood would be completed before the Court could reach a decision on the merits. In addition, the Navy can resort to another administrative remedy—the application for Presidential exemption—in the event that it is dissatisfied with the administrative processing of its permit application at EPA. In either case, this Court is being asked to consider a question that is thus more academic than real at this juncture.

This Court on many occasions has expressed its disinclination to consider petitions raising questions that are likely to become moot.[20] Even if a case may not be completely mooted during the pendency of an appeal, this Court has observed that certiorari should not be granted

---

[18] *Id.*

[19] Public Notice No. NPDES 81-161, Application No. PR0023582, EPA Region II, May 29, 1981.

[20] *E.g.*, Cousins v. Wigoda, 409 U.S. 1201, 1204 (Rehnquist, Circuit Justice, 1972); Taggart v. Weinacker's, Inc., 397 U.S. 223, 226 (1970) (per curiam).

to resolve the "small embers of controversy" that might remain.[21]

Furthermore, since the Navy can apply for a Presidential exemption from the permit requirement, it can extinguish whatever controversy remains without resort to this Court. If the Navy is sincere in asserting that an injunction would affect its national security obligations,[22] then the Navy will presumably apply for Presidential exemption in the event that the permit procedure fails to produce a result satisfactory to it. In either case—whether the Navy resolves the matter through EPA or the Executive Office of the President—this Court's intervention is hardly merited.

II. The Ruling of the Court Below Does Not Conflict with Fourth Circuit Decisions Cited by the Navy.

The Navy asserts that the decision of the court below conflicts with the decisions of the Fourth Circuit in *State Water Control Board* v. *Train*, 559 F.2d 921 (4th Cir. 1977), and *Consolidation Coal Co.* v. *Costle*, 604 F.2d 239 (4th Cir. 1979), *rev'd sub nom. EPA* v. *National Crushed Stone Ass'n*, —— U.S. ——, 66 L.Ed. 2d 268 (1980).[23] Each of these cases is consistent analytically and philosophically with the decision of the First Circuit in this case.

State Water Control Board dealt with the narrow problem of whether the receipt of grant money under the Clean Water Act by publicly owned treatment works for construction of treatment plants was a condition precedent to compliance with a requirement to achieve by July

---

[21] Taggart v. Weinacker's, Inc., 397 U.S. 223, 225 (1970) (per curiam).

[22] Navy Pet. 13-14.

[23] Navy Pet. 5-6. The Navy's petition does not cite the decision of this Court in *National Crushed Stone*.

1, 1977, the degree of effluent reduction attainable through secondary treatment under Section 301(b)(1) of the Act, 33 U.S.C. § 1311(b)(1). The court's opinion said merely that courts have equitable discretion to determine whether and to what extent injunctive sanctions should be imposed "for violations brought about *by good faith inability* to comply with the deadline." 559 F.2d at 927 (emphasis added). Similarly, the issue before the Fourth Circuit in *Consolidation Coal* was whether and to what extent sanctions could be imposed on coal companies that exercised "good faith efforts" to comply with the best practicable control standards but were unable to do so by the July 1, 1977, deadline. 604 F.2d at 245.

Neither decision involved a situation where, as here, the polluter "utterly disregarded the statutory mandate" to obtain an NPDES discharge permit. The First Circuit could hardly have chosen stronger words than those to characterize the Navy's conduct.[24] Violations of the permit requirements of the Clean Water Act in utter disregard of the statutory mandate are different from the "good faith" efforts to comply with the July 1, 1977, compliance deadlines involved in *State Water Control Board* and *Consolidation Coal*. Nothing in the Fourth Circuit decisions suggests, even by implication, that a more stringent remedial policy should not be applied by

---

[24] Courts reserve the phrase "utter disregard" to express strong disapproval of a party who willfully ignores a legal obligation. *See, e.g.*, FTC v. National Lead Co., 352 U.S. 419, 429 (1957):

> Those in utter disregard of law, as here, "call for repression by sterner measures than where the steps could reasonably have been thought permissible."

(*Quoting from* United States v. United States Gypsum Co., 340 U.S. 76, 89-90 (1950).) *Accord*, NLRB v. Union Nacional de Trabajadores, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); United States v. Gonzales Vargas, 558 F.2d 631 (1st Cir. 1977); Standard Oil Co. of California v. FTC, 577 F.2d 653, 662 (9th Cir. 1978).

the federal courts in the circumstances presented by this case.

III. The First Circuit Applied Settled Principles of Federal Law in Enjoining the Navy's Violations of the Clean Water Act.

The decision of the court below is fully consistent with other decisions under the Clean Water Act and related environmental statutes. The court below, in fact, properly relied on two longstanding decisions involving the propriety of injunctive relief for violations of the Act's permit requirements.

In *Save Our Sound Fisheries Ass'n* v. *Callaway*, 387 F. Supp. 292 (D.R.I. 1974), the court enjoined the Army from disposing of dredged materials in violation of several laws, including the Clean Water Act. The court stated:

> The statutory procedures for obtaining a permit . . . before potentially harmful substances are introduced into the water are designed to insure that such decisions are based on specific and informed findings regarding the effect of such dumping on the marine environment.[25]

And in *Cooper* v. *Wisdom*, 440 F. Supp. 1027 (S.D. Fla. 1977), the court restrained the Army from dredging marine areas under the authority of an invalid NPDES permit. The court stated that because the operation was being carried on without a valid permit, it "has therefore not been evaluated according to established criteria." The court concluded that "the plaintiff's right to protective relief from the effects of an invalid permit is clear." 440 F. Supp. at 1030.

The permit requirement in Section 301(a) is the "enforcement hub" of the Act, at the center of a "web of

---

[25] 387 F.Supp. at 299-300.

complex interrelated regulatory programs." [26] The permit is the mechanism by which individual point sources are directly brought into compliance with the Act.[27] If the courts in their discretion could allow certain point sources to circumvent the prohibition of Section 301(a), polluters would be free to discharge their effluents without undergoing the detailed administrative review and compliance procedures mandated by the Act. This result clearly contravenes Congress' intent in designing the permit system "to regulate to the fullest extent possible those sources emitting pollution. . . ." [28] The Court of Appeals recognized this when it ordered the Navy to take all steps necessary to insure that no ordnance is discharged into the coastal waters of Vieques until it obtains an NPDES permit.

The courts have a responsibility to "protect the integrity of the . . . process mandated by Congress. . . ." [29] Congress has decided the order of priorities in the area of federal water pollution control efforts, and structured the NPDES permit process accordingly. Now "it is for the Executive to administer the laws and for the courts to enforce them. . . ." [30] If the Navy wishes to modify the Congressional scheme for the issuance of discharge permits, it should request such a change from Congress—not by judicial fiat.[31]

---

[26] United States v. Holland, 373 F. Supp. 665, 668 (M.D. Fla. 1974). *See also* United States v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir. 1979).

[27] *See* S. Rep. No. 92-414, 92d Cong., 1st Sess. 72 (1971), *reprinted in* 2 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong., 1st Sess. 1490 (1973).

[28] United States v. Earth Sciences, Inc., 599 F.2d 368, 373 (10th Cir. 1979).

[29] Jones v. Lynn, 477 F.2d 885, 892 (1st Cir. 1973).

[30] Tennessee Valley Authority v. Hill, 437 U.S. 153, 194 (1978).

[31] The Navy, by reference to the legislative history of the Clean Water Act, attempts to show that Congress did not mean to "limit

The decision of the Court of Appeals is also consistent with the general rule that where a court is called upon to enjoin the continuing violation of a federal statute, general considerations of "equity" are tempered by the obligation to carry out the statutory mandate.[32] The rule does not change when courts are called upon to enjoin massive or nearly-completed government projects, even when many millions of dollars of public funds have already been spent.[33] As this Court stated recently in

---

the traditional role of the courts in the enforcement process." Navy Pet. 8. On this point, however, the legislative history of the Clean Water Act is no different from that of any other major environmental statute. Congress intended to prohibit "the discharge of any pollutant," 33 U.S.C. § 1311(a), unless the discharger first secures an NPDES permit pursuant to 33 U.S.C. § 1342. The legislative history emphasizes the specificity and precision with which Congress wrote these mandatory standards for environmental protection into the Act. *See, e.g.*, Senate Debate on S. 2770, Nov. 2, 1971, in 2 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong., 1st Sess. 1272 (1973).

Congress intended the permit to be the only means by which a discharger could escape the total prohibition of Section 1342. Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369, 1374 (D.C. Cir. 1977); Bethlehem Steel Corp. v. Train, 544 F.2d 657, 659 (3d Cir. 1976), *cert. denied*, 430 U.S. 975 (1977). This Court specifically recognized that the Clean Water Act "established a new system of regulation under which it is illegal for *anyone* to discharge pollutants into the Nation's waters except pursuant to a permit." Milwaukee v. Illinois, —— U.S. ——, 49 U.S.L.W. 4445, 4447 (Apr. 28, 1981) (emphasis added). Two lower courts have reached the same conclusion. Cooper v. Wisdom, 440 F.Supp. 1027, 1030 (S.D. Fla. 1977); Save our Sound Fisheries Ass'n v. Callaway, 387 F.Supp. 292 (D.R.I. 1974).

[32] *See, e.g.*, Tennessee Valley Authority v. Hill, 437 U.S. 153, 194 (1978); United States v. City and County of San Francisco, 310 U.S. 16, 30-31 (1940) (rejecting "balancing of equities" with respect to an injunction where violation of Raker Act was shown); Buscaglia v. District Court of San Juan, 145 F.2d 274 (1st Cir.), *cert. denied*, 323 U.S. 793 (1944).

[33] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) (injunction upheld against a federal highway project which

American Textile Manufacturers Institute, Inc. v. *Donovan*: [34]

> For "[t]he judicial function does not extend to substantive revision of regulatory policy. That function lies elsewhere—in Congressional and Executive oversight or amendatory legislation." *Industrial Union Department* v. *American Petroleum Institute, supra*, slip op., at 2 (Burger, C.J., concurring); see *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 185, 187-188, 194-195 (1978).

Only two months before the Navy filed its petition with this Court, the federal government successfully defended the lower court's issuance, without an evidentiary hearing, of an injunction to enforce new source performance standards under the Clean Air Act. *United States* v. *City of Painesville, Ohio*, 644 F.2d 1186 (6th Cir. 1981). In words that are relevant to this case as well, the court said:

> In *Hecht Co.* v. *Bowles*, 321 U.S. 321, 330 (1944), the Supreme Court emphasized that when a court is called upon to enforce a federal statutory injunction, its reliance upon the traditional practices of equity

---

had been underway for more than ten years); National Wildlife Federation v. Coleman, 529 F.2d 359 (5th Cir.), *cert. denied sub nom.* Boteler v. National Wildlife Federation, 429 U.S. 979 (1976) (court enjoined ongoing construction of interstate highway upon finding a violation of the Endangered Species Act). In the leading case of Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1971), the government violated NEPA and Federal Highway Administration regulations by failing to prepare written environmental assessments of a highway project in downtown Seattle. Citing United States v. City and County of San Francisco, 310 U.S. 16 (1940), the Court of Appeals stated that "this case does not call for a balancing of equities . . .," 455 F.2d at 1116 (*quoting from* 310 U.S. at 30), and enjoined all construction and ordered the government to submit a detailed timetable of compliance with NEPA and other environmental statutes and regulations. *Id.* at 1122.

[34] —— U.S. ——, 49 U.S.L.W. 4720, 4733-34 (June 17, 1981).

must be "conditioned by the necessities of the public interest which Congress has sought to protect." In enacting the Clean Air Act, Congress made a determination that the public interest required that substantial measures be taken to combat the deleterious effects of air pollution. See 42 U.S.C. § 7401. The district court's discretionary injunctive powers were therefore tempered by its obligation to carry out the Congressional mandate contained in the Clean Air Act.

In a recent case, *TVA* v. *Hill*, 437 U.S. 153 (1978) (the "snaildarter" case), the Court held that the Endangered Species Act required the District Court to enjoin the completion of the Tellico Dam in East Tennessee, despite the lower court's doubts about the "wisdom . . . of a particular course consciously selected by the Congress." *Id.* at 194. The Court emphasized that it is the exclusive province of the Congress to formulate legislative policies and establish their relative priority . . . .

By enacting the Clean Air Act, Congress established a high priority for control of air pollution. The legislature recognized that compliance would be expensive in some cases, but the choice was made to require compliance with the standards promulgated by EPA. Having made that choice, Congress did not contemplate that its decision would be thwarted by judicial reluctance to require compliance when enforcement proceedings are brought and liability is proven. Accordingly, this Court holds that the district court was required to order injunctive relief upon its finding of liability, once negotiations for a compliance plan broke down. A hearing to determine the presence of irreparable injury and inadequacy of legal remedy was therefore unnecessary.[35]

---

[35] 644 F.2d at 1193-94.

IV. The Decision of the Court of Appeals is a Narrow, Fact-Specific Decision that Raises No Significant Question of Federal Law.

In its petition, the Navy hypothesizes that the ruling below will have the far-reaching consequence of mandating the issuance of injunctions to redress technical violations of any federal environmental law. This argument, however, is not consistent with the limiting language of the First Circuit's decision. The Court of Appeals was careful to emphasize that it was not dealing with a "technical" violation of the Clean Water Act. Instead, the court reacted to the Navy's "utter disregard" of the statutory mandate. The injunction directed by the court below is an appropriate response to the Navy's egregious disregard of the permit requirements of the Clean Water Act.

The petition of the Navy raises only the narrow issue of the type of relief to be awarded for the utter disregard of the specific Clean Water Act requirement that an NPDES permit be obtained for the discharge of pollutants from point sources. The decision of the court below does not have broad implications. It does not establish precedent for the type of remedies that are appropriate for violations of lesser severity, violations of other provisions of the Clean Water Act, or violations of other environmental statutes. The decision of the court below is narrowly circumscribed by the unique and unusual facts of this case. Lower courts and other litigants would profit little from this Court's review of the Navy's petition.

V. Denial of the Navy's Petition Will Preserve the Fair and Equitable Relief Secured by Puerto Rico in the Court of Appeals.

The intensification of bombing and shelling activities on Vieques has adversely affected the marine environment in the coastal waters of Vieques. These activities continue to pose a significant hazard to the health and well-being of the island's inhabitants.[36] The injunction ordered by the court below, limited as to scope and duration, may enhance the quality of the marine environment and promote the safety of the people of Vieques.[37]

Puerto Rico has sought diligently to compel the Navy to observe the requirements of the Act. The relief that properly has been ordered under the Act should not be overturned.

---

[36] The Navy asserts that the permit process is unlikely to yield new information about the "more extensive environmental harm" (Navy Pet. 14) resulting from its discharge of ordnance into the waters of Vieques on the ground that the environmental impact statement (EIS) it has now prepared allegedly discloses no significant adverse impacts on the coastal waters from the discharge of ordnance. But the EIS is a *Navy* document, not an *EPA* document. Furthermore, an important part of what the Court of Appeals was saying is that the permit process could reveal information that would help prevent or control environmental impact, not just whether there is greater environmental impact than is revealed by the EIS. The Navy's assertion totally disregards the role of the EPA in its review of NPDES permit applications and exhibits a disturbing indifference to the thrust of the permit requirements under the Clean Water Act. In any event, the Court of Appeals' determination that the permit process might reveal relevant information is not clearly erroneous, particularly in light of the report prepared for the Navy in 1972 warning about the environmental consequences of a shift from Culebra to Vieques.

[37] Ordnance can miss the target by at least six miles. During trial a shell missed the target by about six miles and nearly hit a fishing boat. C.A.J.A. 2738.

CONCLUSION

For these reasons, the Navy's petition for a writ of certiorari should be denied.

Respectfully submitted,

HECTOR REICHARD DE CARDONA
Secretary of Justice

THOMAS R. LINCOLN
Department of Justice

GERARDO A. CARLO
Special Counsel to the Governor

JOHN A. HODGES
(Counsel of Record)

TIMOTHY L. HARKER
LAWRENCE WHITE
JEFFREY N. MARTIN

PEABODY, RIVLIN, LAMBERT & MEYERS
A Professional Corporation
1150 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 457-1000

Counsel for Respondents

Of Counsel

LEWIS A. RIVLIN
1150 Connecticut Ave., N.W.
Washington, D.C. 20036

July 1, 1981

Office-Supreme Court, U.S.
FILED
AUG 14 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1990

In the Supreme Court of the United States

OCTOBER TERM, 1980

CASPAR WEINBERGER, ET AL., PETITIONERS

v.

CARLOS ROMERO-BARCELO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1990

CASPAR WEINBERGER, ET AL., PETITIONERS

v.

CARLOS ROMERO-BARCELO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

1. Respondents mischaracterize the issue presented in our petition. The question presented is not whether the provisions of the Clean Water Act "temper" the normal equitable discretion of the federal courts, but whether the Act prohibits the courts from taking equitable factors into account at all in formulating a remedy.[1] As stated in our petition (Pet. 10-11), equitable relief is presumptively appropriate to remedy violations of the Clean Water Act

[1]Indeed, in the case respondents cite to support their "tempering" claim (Br. in Opp. 13-14), the district court did not order immediate cessation of activity upon finding a violation. Instead, the court ordered the parties to negotiate a remedial order. *United States* v. *City of Painesville*, 431 F. Supp. 496, 501 (N.D. Ohio 1977). Only after a year of futile negotiations did the district court order cessation of the violating activity, and, even then, it granted a stay pending appeal as a substitute for a grace period. See *United States* v. *City of Painesville*, 644 F. 2d 1186 (6th Cir. 1981), petition for cert. pending, No. 81-164 (filed July 27, 1981).

and we agree that such relief will frequently include enjoining the violation. Our claim is simply that in designing the appropriate relief, the court must carefully consider the particular circumstances to determine the relief most likely to bring the violator into compliance with the Act as soon as practicable. If this consideration shows that an injunction is not appropriate, nothing in the Act or this Court's decisions requires that it be entered.

2. Respondents suggest that the issue presented in our petition will shortly become moot because the EPA has announced a tentative decision to issue an NPDES permit. They claim "administrative processing of the Navy's application for an NPDES permit in all likelihood would be completed before the Court could reach a decision on the merits" (Br. in Opp. 7). As noted in the petition (Pet. 13), Section 401(a) of the Clean Water Act, 33 U.S.C. (Supp. III) 1341(a), requires a certification of compliance with state water quality standards before the EPA may issue an NPDES permit. In the present case, the Governor of Puerto Rico, respondent herein, has requested and received an extension of time to and including December 20, 1981, in which to determine whether a state certification will be issued. Moreover, on June 25, 1981, the Puerto Rico Environmental Quality Board (EQB), also a respondent herein, issued a notice of "Intention to Deny Water Quality Certificate" (App., *infra*).[2]

Should the state water quality certificate ultimately be denied on or before December 20, 1981, further legal or administrative proceedings will have to be taken, either to modify the proposed permit to meet EQB objections to it, or to set aside the EQB's denial of certification. Resolution

---

[2]This notice was issued despite the rulings of both the district court and the court of appeals that the Navy had complied with Puerto Rican water quality standards (Pet. App. 18a-22a, 81a-86a).

of these matters may take years. Thus, respondents' suggestion that the issue presented in our petition is likely to become moot before this Court can decide it is simply incorrect.[3]

For the foregoing reasons and the additional reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

AUGUST 1981

---

[3]Respondents also claim (Br. in Opp. 5) that the petitioners received notice that the incidental release of ordnance into coastal waters might be subject to Section 301 of the Clean Water Act, 33 U.S.C. (& Supp. III) 1311, because a similar claim was raised in *Aluli* v. *Brown*, 437 F. Supp. 602 (D. Hawaii 1977), rev'd in part, 602 F. 2d 876 (9th Cir. 1979). While the Clean Water Act claim may have been included in the complaint, it was never litigated by the parties. *Aluli* was settled in December 1980, through a consent order that did not provide for application for, or receipt of, an NPDES permit.

APPENDIX

JUN 25 1981

ENVIRONMENTAL QUALITY BOARD

PUBLIC NOTICE

INTENTION TO DENY WATER QUALITY CERTIFICATE
NPDES PR 0023949

The Environmental Quality Board (EQB) has received and evaluated an application for a Water Quality Certificate from the U.S. Naval Station Roosevelt Roads, Atlantic Fleet Weapons Training Facility, Vieques, Puerto Rico for military activities on the eastern part of Vieques on lands owned by the United States Navy.

The petitioner proposes shelling from air and sea, to land, and to conduct artillery practices for the purpose of training military personnel.

After evaluating the application for federal discharge permit, the draft federal discharge permit developed by the Environmental Protection Agency, and other available documents, the EQB has the intention of DENYING the requested Water Quality Certificate because there is no reasonable assurance that the U.S. Naval Station Roosevelt Roads will comply with the applicable regulations of the Water Quality Standards and other EQB requirements.

Copy of the discharge permit application filed by the applicant before the Environmental Protection Agency, the Intent to Deny the Water Quality Certificate, and pertinent documents, are available to the public for examination in the Application Office of the EQB, located at Floor M of the Empire Bldg., 204 del Parque Street, Corner of Pumarada Street, Santurce, P.R. Copies of such documents can be obtained ($.20 per page) at the aforementioned address between 8:00 A.M. and 4:30 P.M., from Monday thru

Friday (except holidays) or by writing to the following address: Environmental Quality Board, Box 11488, Santurce, PR 00910.

Concerned or affected parties can submit their written comments to the President of the EQB not later than 30 days after the publication of this notice. The deadline for submitting comments can be extended if it is necessary or appropriate in the public interest.

All affected or concerned parties can request a public hearing. The request should be submitted in writing to the President of the EQB not later than 30 days after the publication of this notice stating the reasons which in the opinion of the applicant merit celebration of the public hearing.

All concerned or affected parties will have a reasonable opportunity to present evidence or testimony during a public hearing on whether or not the Water Quality Certificate should be issued or rejected, if the President of the EQB determines that such hearing is necessary or appropriate.

Office - Supreme Court, U.S.
FILED
NOV 20 1981
ALEXANDER L. STEVAS, CLERK

No. 80-1990

In the Supreme Court of the United States

OCTOBER TERM, 1981

CASPAR WEINBERGER, ET AL., PETITIONERS

v.

CARLOS ROMERO-BARCELO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONERS

REX E. LEE
Solicitor General

ANTHONY C. LIOTTA
Acting Assistant Attorney General

EDWARD J. SHAWAKER
ANNE S. ALMY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

CAPTAIN THOMAS E. FLYNN
Office of Judge Advocate General
Department of the Navy
Alexandria, Virginia 22332

RICHARD M. CORNELIUS
Assistant General Counsel
Department of the Navy
Washington, D.C. 20350

QUESTION PRESENTED

Whether injunctions to require immediate cessation of discharges in violation of the Clean Water Act are mandatory under the standards articulated in *TVA* v. *Hill*, 437 U.S. 153 (1978), and not subject to the equitable discretion of the district court.*

---

* In addition to the Secretary of Defense, the defendants below included the Secretary of the Navy, the Chief of Naval Operations, the Commander in Chief of the Atlantic Fleet, the Commandant of the Marine Corps, the Caribbean Commander of the Atlantic Fleet, the Commandant of the Coast Guard, and "unnamed John Doe Defendants." In addition to Carlos Romero-Barcelo, the Governor of the Commonwealth of Puerto Rico, the original plaintiffs below included the Mayor of Vieques, the Commonwealth Environmental Quality Board, Misíon Industrial de Puerto Rico, Inc., and individual fishermen/residents of Vieques: Luis Medina, Jésus Medina, Mario Antolino Felix, Cristóbal Medina, Severino Ventura Cintrón, Héctor Medina, Cristóbal Medina, Jr., Enrique García, Antonio Ayala González, Angel Ventura and Daniel Medina. Plaintiffs-intervenors included: Carlos A. Zenón, Mario Félix Mariano Rivera Guishard, Alicio Ayala Sota, Francisco Medina Meléndez, Esmeraldo Meléndez and Santos Ríos, fishermen who are residents of Vieques, the "Asociación de Pescadores de Vieques, Inc.," a cooperative of Vieques fishermen, and "Fundación Arqueológica, Antropologica e Historica de Puerto Rico," a non-profit corporation involved in research and preservation of historical and prehistorical cultural resources (Pet. App. 53a-54a).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Statement	2
Introduction and summary of argument	9
I. The Clean Water Act does not include a congressional judgment overriding all equitable discretion; instead flexibility of enforcement remedy is necessary	14
II. The district court properly formulated a remedy designed to bring the Navy into compliance with the Clean Water Act	20
Conclusion	27

TABLE OF AUTHORITIES

Cases:

Aaron v. *SEC*, 446 U.S. 680	11
Califano v. *Yamasaki*, 442 U.S. 682	11
City of Milwaukee v. *Illinois*, No. 79-408 (Apr. 28, 1981)	17, 20
E.I. Dupont de Nemours & Co. v. *Train*, 430 U.S. 112	19
EPA v. *National Crushed Stone Association*, 449 U.S. 64	15
Hecht Co. v. *Bowles*, 321 U.S. 321	9, 10, 11, 17, 18
Middlesex County Sewage Authority v. *National Sea Clammers Association*, No. 79-1711 (June 25, 1981)	24
National Rifle Association v. *Kleppe*, 425 F. Supp. 1101, aff'd, 571 F.2d 674	21

Cases—Continued Page

Realty Income Trust v. *Eckerd*, 564 F. 2d 447 17
Reserve Mining Co. v. *EPA*, 514 F. 2d 492 16
Rondeau v. *Mosinee Paper Corp.*, 422 U.S. 49 11
State of Alaska v. *Andrus*, 580 F. 2d 465, vacated in part *sub nom. Western Oil & Gas Association* v. *Alaska*, 431 U.S. 922 ..... 10, 17
State Water Control Board v. *Train*, 559 F. 2d 921 ..
TVA v. *Hill*, 437 U.S. 153 ..... 9, 11, 12, 14, 15, 17, 26
Union Electric v. *EPA*, 427 U.S. 246 15
United States v. *Kennebec Log Driving Co.*, 491 F. 2d 562, on remand, 399 F. Supp. 754 16
United States v. *Republic Steel Corp.*, 362 U.S. 482 .. 16
United States v. *Rohm & Haas Co.*, 500 F. 2d 167, cert. denied, 420 U.S. 962 16
United States ex rel. Greathouse v. *Dern*, 289 U.S. 352 17

Statutes and regulations:

Clean Air Act Amendments of 1970, 42 U.S.C. (Supp. III) 7401 *et seq.* 4
42 U.S.C. (Supp. III) 7064 24
Coastal Zone Management Act of 1972, 16 U.S.C. 1451 *et seq.* 4
Endangered Species Act of 1978, 16 U.S.C. (& Supp. III) 1531 *et seq.* 4
Section 2(b), 16 U.S.C. 1531(b) 12
Section 2(c), 16 U.S.C. 1531(c) 12
Section 7, 16 U.S.C. 1536 ..... 12, 14, 15
Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. (& Supp. III) 1251 *et seq.* 2, 4, 5
Section 101(a), 33 U.S.C. (& Supp. III) 1251(a) 18
Section 301(a), 33 U.S.C. 1311(a) 14, 21
Section 301(b), 33 U.S.C. (Supp. III) 1311(b) 21
Section 304(b), 33 U.S.C. 1314(b) 21
Section 309(a)(1), 33 U.S.C. (Supp. III) 1319(a)(1) 20

Statutes and regulations—Continued — Page

Section 309(b), 33 U.S.C. 1319(b) 15, 17
Section 313(a), 33 U.S.C. (Supp. III) 1323 (a) 14, 23, 25
Section 401(a), 33 U.S.C. (Supp. III) 1341 (a) 6, 19
Section 402, 33 U.S.C. 1342 21
Section 402(a), 33 U.S.C. (& Supp. III) 1342(a) 25
Section 404, 33 U.S.C. 1344 24
Section 502(6), 33 U.S.C. 1362(6) 6
Section 502(12), 33 U.S.C. 1362(12) 6
Section 502(14), 33 U.S.C. (Supp. III) 1362 (14) 6
Section 504(a), 33 U.S.C. (Supp. III) 1364 (a) 15
Section 505, 33 U.S.C. 1365 25
Section 505(b)(1)(A), 33 U.S.C. 1365(b)(1) (A) 24
Section 505(b)(1)(B), 33 U.S.C. 1365(b)(1) (B) 17
Section 505(c)(2), 33 U.S.C. 1365(c)(2) 19
Marine Mammal Protection Act of 1972, 16 U.S.C. 1361 *et seq.* 4
Migratory Bird Treaty Act, 16 U.S.C. 703 *et seq.* 21
National Environmental Policy Act, 42 U.S.C. (& Supp. III) 4321 *et seq.* 4
National Historic Preservation Act of 1966, 16 U.S.C. 470 *et seq.* 4
Noise Control Act of 1972, 42 U.S.C. 4901 *et seq.* 4
Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.* 4
Rivers and Harbors Appropriation Act of 1899 (Refuse Act), 33 U.S.C. 401 *et seq.* 5, 16
Section 10, 33 U.S.C. 403 24
28 C.F.R. 50.07 17
40 C.F.R.:
Section 123.9(c) 20
Part 400 *et seq.* 21

Miscellaneous: Page

A Legislative History of the Clean Air Act Amendments of 1970, 93d Cong., 2d Sess. (1974) 24
A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess. (1973) 16, 18, 19
Exec. Order No. 11593, 36 Fed. Reg. 8921 (1971) .. 4, 5
Exec. Order No. 12088, 43 Fed. Reg. 47707, 47709 (1978) 25-26
46 Fed. Reg. 12773 (1981) 6
H.R. Rep. No. 92-911, 92d Cong., 2d Sess. (1972) .. 18
H.R. Rep. No. 93-412, 93d Cong., 1st Sess. (1973) .. 12
7 *Moore's Federal Practice* (2d ed. 1980) 18
S. Rep. No. 92-414, 92d Cong., 1st Sess. (1971) 16
S. Rep. No. 93-307, 93d Cong., 1st Sess. (1973) 12-13

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-1990

CASPAR WEINBERGER, ET AL., PETITIONERS

v.

CARLOS ROMERO-BARCELO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-51a) is reported at 643 F.2d 835. The opinion of the district court (Pet. App. 53a-168a) is reported at 478 F. Supp. 646.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1981 (Pet. App. 169a-170a). A timely petition for rehearing was denied on February 27, 1981 (Pet. App. 52a). The petition for a writ of certiorari was filed on May 26, 1981, and granted on October 5, 1981 (J.A. 186). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The pertinent provisions of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. (& Supp. III) 1251 *et seq.*, are reprinted in Pet. App. 171a-180a.

STATEMENT

This case concerns the Navy's use of part of Vieques Island, Puerto Rico, as a range for air-to-ground, naval gunfire, and amphibious weapons training. The island, located off the southeast coast of Puerto Rico, is approximately 20 miles long and has an average width of 4 miles. It consists of approximately 33,000 acres, of which the United States owns more than 25,000 acres. For many years, the Department of the Navy has used a small portion of the eastern end of the island for weapons training. The remaining Navy-held land is used primarily as a buffer zone. (See Pet. App. 57a, 61a, 63a, 167a-168a.)

The weapons training areas on Vieques are part of a larger complex known as the Atlantic Fleet Weapons Training Facility, headquartered at Roosevelt Roads Naval Station in Ceiba, Puerto Rico. This complex consists of four ranges: (1) the outer range, a large area of ocean lying to the north and south of Vieques,[1] (2) the underwater range, located off the western shore of St. Croix, (3) the electronic warfare range consisting of a series of facilities located on Puerto Rico, Vieques and other neighboring islands,[2]

---

[1] At its closest points, the outer range is 35 miles north of Vieques, and 20 miles to the south.

[2] These facilities, referred to as "threat platform" simulators, are designed to "provide a realistic electronic environment for the training of shipboard electronic warfare teams

and (4) the inner range consisting of the targets on Vieques. Because of the existence of all these facilities in the area, naval vessels and crews have the unique opportunity to conduct exercises on several of the ranges under conditions that simulate, as far as possible, actual combat. Accordingly, all Atlantic Fleet vessels assigned to the Mediterranean and the Indian Ocean must successfully complete their training at Vieques to meet operational qualifications standards. Cessation or interruption of Navy activity on Vieques would cripple the service's ability to perform tasks assigned to it by the National Security Council. (See Pet. App. 163a-165a.)

The targets on Vieques consist of artillery targets, two bull's-eye targets for inert air-to-ground bombing practice, strafing targets, a series of mock targets of opportunity (*e.g.*, mock surface-to-air missile sites, fuel farm, ammunition dump and airstrip) for live air-to-ground bombing practice, and two remote controlled moving targets. There are also six naval gunfire targets. (Pet. App. 7a.) These targets are all in the eastern portion of the island. The artillery targets, the bull's-eye inert bombing targets, and the strafing targets are located in an area known as the Surface Impact Area (SIA). The western boundary of the SIA is nine kilometers from the closest portion of the civilian occupied area of Vieques. (*Id.* at 6a-7a.) The remaining targets are located to the east of the SIA, in an area known as the Air Impact Area or Close Air Support Zone (AIA/CAS). The closest point of the civilian zone is about 13 kilometers from

---

and tactical electronic order-of-battle, in support of exercises and operations conducted on the various other ranges" (Pet. App. 62a-63a; 478 F. Supp. at 655).

the border of AIA/CAS. The area between the civilian zone and the SIA is occasionally used for amphibious landing exercises; it is also leased to the local cattle association for grazing purposes. *Ibid.*

Air and sea operations in the inner range occur about 200 days a year, between the hours of 7:30 a.m. and 10:00 p.m. Aircraft training on the range are forbidden to fly over civilian areas, and ordinarily come no closer to such areas than five miles. Vessels shooting at targets in the AIA/CAS are positioned three to eleven miles south of the island. A danger zone in the sea surrounding Vieques, which prohibits civilian navigation in the area, is activated when the range is in use. (Pet. App. 7a.)

2. On March 1, 1978, the Governor of Puerto Rico, Carlos Romero-Barcelo, and others initiated a suit seeking to enjoin continued use of the island for weapons training. The complaint (J.A. 3-54) charged the Navy with violations of almost every piece of major environmental legislation enacted by Congress in the last decade, including the National Environmental Policy Act (NEPA), 42 U.S.C. (& Supp. III) 4321 *et seq.*; the Clean Water Act, 33 U.S.C. (& Supp. III) 1251 *et seq.*; the Clean Air Act Amendments of 1970, 42 U.S.C. (Supp. III) 7401 *et seq.*; the Noise Control Act of 1972, 42 U.S.C. 4901 *et seq.*; the Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*; the Endangered Species Act of 1973, 16 U.S.C. (& Supp. III) 1531 *et seq.*; the National Historic Preservation Act of 1966, 16 U.S.C. 470 *et seq.* (and Exec. Order No. 11593, 36 Fed. Reg. 8921 (1971), which implements that Act); the Coastal Zone Management Act of 1972, 16 U.S.C. 1451 *et seq.*, and the Marine Mammal Protection Act of 1972, 16 U.S.C. 1361 *et seq.*

In addition, the complaint claims violations of the Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. 401 *et seq.*, various amendments to the United States Constitution, and congressional and presidential directives concerning cessation of Navy operations on the neighboring island of Culebra. (See Pet. App. 55a-56a.)[3]

The district court held an extensive hearing on the merits of these allegations. The hearing on motions for a preliminary injunction, later consolidated as a hearing on the merits, lasted approximately 50 days and included testimony by dozens of lay and expert witnesses. The district court also made two site visits to Vieques to inspect the inner range and the surrounding waters (Pet. App. 56a-57a).

On September 17, 1979, the district court filed a comprehensive decision and order (Pet. App. 53a-168a). It found the Navy in violation of NEPA for failure to file an Environmental Impact Statement (EIS) or a reviewable environmental record to support a decision not to file such a statement (*id.* at 155a-159a). It held the Navy to be in violation of the Clean Water Act, 33 U.S.C. (& Supp. III) 1251 *et seq.*, for occasionally and inadvertently discharging ordnance into coastal waters without a National Pollutant Discharge Elimination System (NPDES) permit (Pet. App. 79a-81a).[4] It also found the Navy had failed to comply fully with Exec. Order No. 11593, *supra*, as it had not nomi-

---

[3] As the district court remarked, the suit presented "an all-inclusive challenge to Defendant Navy's presence and activities in Vieques" (Pet. App. 57a).

[4] These deposits occur during naval gunfire and air to ground training when the land-based targets are missed, and the ammunition hits the water instead.

nated historic sites to the National Register (Pet. App. 134a-138a). It ordered the Navy to file for an NPDES permit, to nominate historic sites to the National Register and to comply with the provisions of NEPA (*id.* at 165a).[5]

Despite the "technical" violation of the Clean Water Act (Pet. App. 162a),[6] the district court found that "no credible evidence was presented

---

[5] The Navy prepared an environmental impact statement; in January 1981, the Secretary of the Navy reviewed the statement and made a formal decision to continue using the weapons training facilities located on Vieques. 46 Fed. Reg. 12773 (1981). The Navy also submitted 34 historic sites to the Keeper of the National Register and requested his opinion on their eligibility to be placed on the register.

Also, on December 28, 1979, the Department of the Navy filed an application for an NPDES permit with the Environmental Protection Agency. On May 29, 1981, the EPA issued a draft NPDES permit and a notice of intent to issue that permit. Section 401(a) of the Clean Water Act, 33 U.S.C. (Supp. III) 1341(a), requires a certification of compliance with state water quality standards before the EPA may issue an NPDES permit. The Respondents herein received an extension of time, to and including December 20, 1981, in which to determine whether a state certification will be issued, and issued a notice of "Intention to Deny Water Quality Certificate" (June 25, 1981) (Reply Mem. App.).

[6] The Clean Water Act defines pollutant to include "munitions" Section 502(6), 33 U.S.C. 1362(6). A "point source" means "any discernable, confined and discrete conveyance, including but not limited to any * * * vessel * * * from which pollutants are or may be discharged." Section 502(14), 33 U.S.C. (Supp. III) 1362(14). Under these definitions, shells and bombs released from naval ships and aircraft can be deemed pollutants discharged from point sources. The firing of ordnance into waters outside the territorial sea (three miles), however, is not subject to the Clean Water Act. See Section 502(12), 33 U.S.C. 1362(12).

* * * [to show] that any of the materials deposited in the waters surrounding Vieques * * * has had any measurable deleterious effects on the environment, or on the quality of the surrounding waters, from a scientific vis-a-vis legal standpoint" (Pet. App. 80a; 478 F. Supp. at 648). This general finding was supported by numerous specific factual findings detailing the exceptional health of the marine environment (*e.g.*, Pet. App. 86a, 115a-133a). In sum, the court concluded (Pet. App. 115a (footnote omitted)):

> Although the nature of Defendant Navy's activities have a tendency towards provoking dramatic conclusions, a dispassionate analysis of the scientific evidence leads us to the conclusion that the negative impact of the Defendant Navy's activities on the coastal zone of Vieques is negligible, and if the truth be said, the control of large areas of Vieques probably constitutes a positive factor in its over all ecology. The very fact that there are in the Navy zones modest numbers of various marine species which are practically non-existent in the civilian sector of Vieques or in the main island of Puerto Rico, is an eloquent example of *res ipsa loquitur*.

Based on these findings, the district court concluded that injunctive relief was not appropriate in this case, because "the activities of the Defendant Navy are not causing any appreciable harm to the Vieques ecology. * * * Nor is there any logical connection between [the rectification of the technical violations] * * * and ordering a halt to the activities of Defendant Navy, other than as punishment, a purpose for which injunctive relief is not appropriate" (Pet. App. 162a). Moreover, the court noted that there was "not the slightest doubt but that the

granting of the injunctive relief sought would cause grievous, and perhaps irreparable harm, not only to Defendant Navy, but to the general welfare of this Nation" (*id.* at 163a), because of the effects on the national security of the loss of the use of the unique training facilities at Vieques.

On appeal,[7] the court of appeals affirmed the district court on most issues.[8] It did not reevaluate the district court's findings concerning the ecological health of the Vieques waters, and indeed agreed that "on this record the district court did not clearly err in its finding" that the dropping of ordnance caused no significant harm to the environment (Pet. App. 49a).[9] But the court held that the district court had

---

[7] Because the literal language of the definitions of the Clean Water Act covers inadvertent release of shells and bombs into the coastal waters off Vieques, and the Environmental Protection Agency was willing to develop an appropriate NPDES permit, the petitioners did not appeal the district court ruling that the Clean Water Act was violated.

[8] In addition to the Clean Water Act issue presented here, the court of appeals remanded issues under the Endangered Species Act and the National Historic Preservation Act to the district court for further consideration (Pet. App. 51a).

[9] The court of appeals did not consider the district court's detailed findings concerning the general health of the marine environment. Those findings were made in connection with the district court's rejection of respondents' claims under the Endangered Species Act; the court of appeals remanded those claims to the district court for reconsideration in light of a "biological opinion" submitted to the Navy after the district court's judgment (Pet. App. 39a-40a). Although that opinion supported the district court's findings (Pet. App. 41a), the court of appeals concluded that the remand was necessary to permit the district court to consider "evidence that both this court, and Congress, deem essential to a complete decision of the issue" (*ibid.*).

used the wrong standard in denying an injunction under the Clean Water Act. Relying on this Court's decision in *TVA* v. *Hill*, 437 U.S. 153 (1978), the court held that the Navy's violation of the statutory mandate ipso facto required the issuance of an injunction; the equitable balancing of competing interests was precluded once the statutory violation was found (Pet. App. 48a-49a).[10] Accordingly, it vacated the remedy devised by the district court and remanded with directions to enter an injunction against the further inadvertent deposit of munitions in the Vieques water without a NPDES permit (Pet. App. 49a).[11]

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals should have looked to *Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944), rather than *TVA* v. *Hill*, *supra*, for the analysis that controls this case. In *Hecht Co.* v. *Bowles*, the administrator of the Emergency Price Control Act of 1942 sought an injunction under a statutory provision directing that "upon a showing * * * that [any] person has engaged * * * in [the prohibited] practices a temporary or permanent injunction, restraining order, or other order shall be granted" (321 U.S. at 327). Although defendant Hecht Co. admitted the violations

---

[10] The court of appeals dismissed the national security interests at stake with the remark that "[i]f this order significantly interferes with the Navy's preparedness it is free to request the President to exempt it from the NPDES requirement in the interest of national security. *See* 33 U.S.C. Sec. 1323(a)" (Pet. App. 49a).

[11] On Mar. 6, 1981, the mandate of the court of appeals was stayed pending the disposition of our petition for certiorari.

charged, the district court refused to enter the immediate cessation order requested. The court of appeals reversed, believing (as did the court of appeals here), the governing statute to "require the issuance of [such an] order as a matter of course, once violations were found." 321 U.S. at 326. This Court rejected that rigid interpretation of the statutory language, finding in the legislative history and the statutory purpose of the Price Control Act (as we urge with respect to the Clean Water Act) no indication of any intent to require such a significant departure from the traditions of equity practice (321 U.S. at 329-330).

The statutory purposes do control the Court's equitable discretion. The exercise of the traditional power of equity must be "conditioned by the necessities of the public interest which Congress has sought to protect" (*id.* at 330). The court's discretion "must be exercised in light of the large objectives of the Act. For the standards of the public interest, * * * measure the propriety and need for injunctive relief in these cases." *Id.* at 331. Thus, in determining the nature of injunctive relief appropriate to remedy a violation of a statute, a particularized analysis of the statutory language, policies and purposes, as well as the facts and circumstances of the violation, is necessary. See *State of Alaska* v. *Andrus*, 580 F. 2d 465, 485 (D.C. Cir.), vacated in part *sub nom. Western Oil & Gas Association* v. *Alaska*, 431 U.S. 922 (1978).

The district court here made just such an analysis, and concluded that (Pet. App. 162a):

> The violations which we have found, are in substance technical violations, which must be cured, but do not require the drastic treatment sug-

would seem to be foreclosed by Hecht Co. v. Bowles

> gested by Plaintiffs. Furthermore, there does not appear any reason why their rectification can not be accomplished in a relatively short period of time. Nor is there any logical connection between the accomplishment of this purpose and ordering a halt to the activities of Defendant Navy, other than as punishment, a purpose for which injunctive relief is not appropriate. See *Hecht Co.* v. *Bowles, supra.*

The court of appeals did not consider whether the district court's balancing of the equities gave sufficient weight to the statutory purposes of the Clean Water Act. Instead, it concluded that the bare fact that the Act had been violated required the issuance of an immediate cessation order—a "position which [*supra*]." *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 60 (1975).[12]

TVA v. *Hill* did not cast doubt on the holding of *Hecht Co.* v. *Bowles.*[13] Indeed, the Court in *TVA* v. *Hill* followed the approach utilized in *Hecht Co.* v. *Bowles*, referring expressly to that case, and the district court's no benefit finding therein (437 U.S. at 193-194). The different result in *TVA* v. *Hill* was due to the specific characteristics of the statute and the factual situation there before the Court. Those special circumstances are not present here.

---

[12] It is not entirely clear whether respondents support this conclusion of the court of appeals, or argue only that the result reached was correct in light of their view of the balance of the equities (compare Resp. Br. in Opp. 10-11 & 8-9, 12, 15).

[13] This court has relied on that decision in cases subsequent to *TVA* v. *Hill*, *Califano* v. *Yamasaki*, 442 U.S. 682, 694 n. 9 (1979); *Aaron* v. *SEC*, 446 U.S. 680, 701 (1980).

Cong., 1st Sess. 6 (1973). Closing the gates of the Tellico Dam, and destruction of the snail darter, would have been directly and fundamentally in conflict with the purposes of the Act.

Neither of these two factors has any parallel in this case. The language, structure, legislative history and consistent administrative interpretation of the Clean Water Act all point to the existence of judicial discretion to fashion whatever relief is appropriate (including, but not limited to, immediate cessation orders) to secure prompt compliance with the purposes of the Act. The district court found that the waters surrounding Vieques are in excellent condition and the court of appeals did not disagree. The district court also found that the immediate cessation of the target practice would severely impede the Navy's accomplishment of its national security responsibilities.[14] In light of those findings, the district court correctly exercised its discretion, consistent with the policies and purposes of the Clean Water Act, in refusing to enjoin continuation of the target practice pending issuance of a NPDES permit.

---

[14] The court of appeals also recognized that cessation of use of the range might interfere with military preparedness, but suggested that enjoining the Navy from missing the targets would not interfere with its training activities (Pet. App. 49a n.55), and that, if it did, the Navy could get a presidential exemption from the Clean Water Act (Pet. App. 49a). Respondents make a similar suggestion (Resp. Br. in Opp. 8). An exemption would not, of course, be as consistent with the purposes of the Clean Water Act as the course chosen by the district court, which contemplates the prompt compliance by the Navy with the Act.

I. THE CLEAN WATER ACT DOES NOT INCLUDE A CONGRESSIONAL JUDGMENT OVERRIDING ALL EQUITABLE DISCRETION; INSTEAD FLEXIBILITY OF ENFORCEMENT REMEDY IS NECESSARY

A. Unlike Section 7 of the Endangered Species Act, the Clean Water Act does not contain any explicit congressional statement subordinating other federal interests to the preservation of water purity. In contrast to the flat ban, without exception when *TVA* v. *Hill* was decided, on the destruction of critical habitats in Section 7, the prohibition in Section 301(a) of the Clean Water Act, 33 U.S.C. 1311(a), can be overcome by the grant of a permit (Section 313(a), 33 U.S.C. (Supp. III) 1323(a)). And Section 313(a), 33 U.S.C. (Supp. III) 1323(a) imposes a duty on federal agencies to comply with water pollution abatement requirements "in the same manner, and to the same extent as any nongovernment entity * * *." Neither Section 301(a) nor Section 313(a) imposes any duty on federal agencies or restrictions on federal actions that do not apply equally to all other dischargers of pollutants.[15] Thus, unless the restrictions of Section 301(a) are deemed to override every competing interest held by anyone in the Nation, the Clean Water Act does not contain an "ordering of priorities" which the Courts are powerless to alter.

The Act cannot reasonably be read as imposing such overriding restrictions. To be sure, Congress expected the Clean Water Act to be vigorously enforced and contemplated immediate cessation orders

---

[15] To the contrary, Congress provided a limited form of relief for federal agencies through the exemption procedure. See note 30, *infra*.

if appropriate to the circumstances. But there is nothing in the Act or its history to suggest that Congress intended to eliminate the traditional discretion of the courts in enforcing the statutory requirements. Cf. *TVA* v. *Hill*, *supra*, 437 U.S. at 193-194. There is instead strong evidence that Congress contemplated that the federal courts would exercise their equitable discretion in fashioning "appropriate relief, including a permanent or temporary injunction" against violations of the Act (Section 309(b), 33 U.S.C. 1319(b)).

1. The entire structure of the Clean Water Act confirms the need for flexibility in developing "appropriate" enforcement mechanisms.[16] The Act sets out a complicated and phased system of pollution abatement punctuated with statutory deadlines. As this Court has held, some of the statutory standards are absolute. See *EPA* v. *National Crushed Stone Association*, 449 U.S. 64 (1980). Cf. *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976). As a result, remedial flexibility will sometimes be needed to avoid the unnecessary hardship that the automatic application of the requirement to extreme factual circumstances might produce.

---

[16] Congress did specify certain circumstances when discharges of pollutants were to be immediately enjoined. In Section 504(a), 33 U.S.C. (Supp. III) 1364(a), it authorized the Administrator of the Environmental Protection Agency to bring suit "to immediately restrain" discharges of pollutants that he finds to be causing or contributing to "an imminent and substantial endangerment of the health of persons or to the welfare of persons * * *." This provision is the only Section of the Clean Water Act that approaches the congressional ordering of priorities this Court found in Section 7 of the Endangered Species Act. It also is strong evidence that Congress did not expect that a rule of automatic, immediate cessation would be applied to all violations of the Act.

2. Nothing in the legislative history of the Act suggests that Congress intended that the only proper judicial response to a violation of the Act would be an immediate cessation order. The Senate Report reveals that "[i]n writing the enforcement procedures involving the Federal Government the Committee drew extensively * * * upon the existing enforcement provisions of the Rivers and Harbors Appropriation Act of 1899 (Refuse Act) [33 U.S.C. 401]". S. Rep. No. 92-414, 92d Cong., 1st Sess. 63 (1971), *reprinted in A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong., 1st Sess. 1481 (1973) ("*Legislative History*"). See also *Legislative History* 1306. Injunctions requiring immediate cessation of discharges in violation of the Act have not been automatic under the Refuse Act. See, *e.g.*, *Reserve Mining Co.* v. *EPA*, 514 F.2d 492, 535-537 (8th Cir. 1975); *United States* v. *Rohm & Haas Co.*, 500 F.2d 167, 195 (5th Cir. 1974), cert. denied, 420 U.S. 962 (1975); *United States* v. *Kennebec Log Driving Co.*, 491 F.2d 562, 571 (1st Cir. 1973), on remand, 399 F. Supp. 754, 759 (D. Me. 1975). Instead courts have carefully fashioned appropriate relief to vindicate the purposes of the statute with due regard to the surrounding facts and circumstances. There is no indication that at the time Congress acted it anticipated any different result. Cf. *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 492 (1960), noting that in the Rivers and Harbors Act—of which the Refuse Act is a part—"Congress has provided enough federal law * * * from which appropriate remedies may be fashioned * * *."

3. Finally, consistent agency practice assumes the existence of the power to provide appropriate relief short of immediate cessation orders. Indeed, enforce-

ment against violators of the Clean Water Act has not been characterized by requests for, or entry of, immediate cessation orders. Rather, enforcement actions typically result, by consent or otherwise, in a remedial order setting out a detailed schedule of compliance designed to cure the identified violation of the Act. See, *e.g.*, *City of Milwaukee* v. *Illinois*, No. 79-408 (Apr. 28, 1981), slip op. 4-5, 15-16. Congress, moreover, has been fully aware of these enforcement procedures.[17]

B. Unlike the circumstances of *TVA* v. *Hill*, *supra*, an order requiring the immediate cessation of the violating activity is rarely the sole remedy available to vindicate the purposes of the Clean Water Act. While an equitable order is appropriate to remedy violations of the Act, immediate cessation of the violating discharges is not always necessary. Instead, courts must fashion "appropriate" relief (33 U.S.C. 1319(b)): relief that adequately vindicates the purposes and policies of the Clean Water Act with due regard to equitable principles. See generally *Realty Income Trust* v. *Eckerd*, 564 F.2d 447, 456-457 (D.C. Cir. 1977); *Hecht Co.* v. *Bowles*, *supra*, 321 U.S. at 329-330; *United States ex rel. Greathouse* v. *Dern*, 289 U.S. 352, 360-361 (1933); *State of Alaska* v. *Andrus*, *supra*, 580 F.2d at 485.

---

[17] The statute apparently contemplates the development of such carefully tailored remedial orders, because it affords interested citizens the opportunity to participate in the formulation of these decrees through intervention (Section 505(b)(1)(B), 33 U.S.C. 1365(b)(1)(B). Department of Justice regulations further provide for a public comment period (28 C.F.R. 50.07). This public participation in the formulation of the decree would, of course, be pointless if every violation of the Act were to be remedied by an immediate cessation order.

7 *Moore's Federal Practice* ¶ 65.18[3], at 65-133 to 65-140.1 (2d ed. 1980). Thus, in most cases, an "appropriate" injunctive remedy is one designed to bring the violator into compliance with the requirements of the Clean Water Act as expeditiously as practicable rather than to require immediate cessation of the discharge.[18] To be sure, immediate cessation is an appropriate remedy in some cases, *e.g.*, where compliance is impossible or the public interest demands it.

More generally, an appropriate remedy must further the fundamental purposes of the Act. The overall purpose of the Clean Water Act is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters" (Section 101(a), 33 U.S.C. (& Supp. III) 1251(a)).[19] To that end,

---

[18] In their opposition to the petition for a writ of certiorari, respondents argue that an immediate cessation order was appropriate in this case because of the Navy's "utter disregard" of the statutory requirement (Resp. Br. in Opp. 8-9, 15). While we disagree with that characterization of the Navy's conduct (see *infra*, pages 23-24), we also submit that respondent's view that the appropriateness of the remedy turns primarily on the culpability of the violator ignores the remedial purpose of the injunctive remedy. As this Court emphasized in *Hecht* v. *Bowles*, *supra*, 321 U.S. at 329, "[t]he historic injunctive process was designed to deter, not to punish".

[19] The word integrity "refers to a condition in which the natural structure and function of ecosystems is maintained" (H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 76 (1972), *reprinted in Legislative History* 763). An ecosystem whose structure and function is "natural" is "one whose systems are capable of preserving themselves at levels believed to have existed before irreversible perturbations caused by man's activities" (H.R. Rep. No. 92-911, *supra*, at 77, *reprinted in Legislative History* 764).

Congress insisted on uniform treatment for classes and categories of dischargers throughout the Nation (see *Legislative History* 162, 356, 452-453, 473-475, 706-707, 710-711; *E.I. Dupont de Nemours & Co.* v. *Train*, 430 U.S. 112, 129-130 (1977)), so as to prevent states from creating pollution havens to lure businesses from states responsibly acting to reduce water pollution. See *Legislative History* 473-475. Consistent with this policy of uniformity, federal effluent limitations guidelines are based upon technical feasibility rather than the effect of discharges on water quality. See *E.I. Dupont de Nemours & Co.* v. *Train*, *supra*.[20] On the other hand, Congress recognized that it was impractical to require immediate achievement of the desired levels of pollution control, and thus provided for a phased program. It is entirely consistent with this statutory scheme for the district courts to provide for some flexibility in the timing of compliance in particular cases, recognizing the practicalities of installing and operating technical equipment, as well as the nature of the violation and the public necessities—*e.g.*, health, safety and welfare—at stake.

If the EPA is a party to the civil action, either as the plaintiff in a federal enforcement action or as an intervenor in a citizen suit (see 33 U.S.C. 1365 (c)(2)), the court will have the recommendation of the Administrator as to the appropriate form of relief.[21] Ordinarily, we would expect a district court

---

[20] Federal NPDES permits must also satisfy state water quality standards. Section 401(a), 33 U.S.C. 1341(a). In some cases, these standards require more stringent conditions than those indicated by national effluent limitations.

[21] In developing a remedial program, the Administrator considers such factors as the practicality of a time schedule

to defer to the EPA's judgment of an appropriate remedial order absent a finding that the EPA's request is arbitrary or capricious or ignores relevant factors. In cases such as this, where the EPA is not a party to an action and has not otherwise addressed the question of an appropriate remedy (through, for example, a compliance order (33 U.S.C. (Supp. III) 1319(a)(1)), a district court must fashion a remedy independently. The primary purpose of any order must be to bring the discharger into compliance with the Act within a reasonable time.[22] But the court should not close its eyes to appropriate equitable considerations in establishing a compliance schedule.

II. THE DISTRICT COURT PROPERLY FORMULATED A REMEDY DESIGNED TO BRING THE NAVY INTO COMPLIANCE WITH THE CLEAN WATER ACT

The district court directed the Navy to apply for an NPDES permit, but declined to enjoin the Navy activity that results in discharges pending issuance of the permit. First and foremost, the district court's remedy was designed to bring the Navy into compli-

---

for compliance, good faith of the discharger, national uniformity of treatment for classes and categories of dischargers and competing interests in health, safety and welfare. And, while lack of environmental damages is not a defense to violation of the Clean Water Act, the likelihood of irreparable degradation of water quality would suggest rigorous remedial action. Cf. 40 C.F.R. 123.9(c).

[22] Remedial orders often involve a timetable for completion of treatment facilities, hiring and training of personnel and other technical issues. See, *e.g.*, *City of Milwaukee* v. *Illinois*, *supra*, slip op. 4-5, 15-16. For this reason, district courts often order the parties to negotiate a remedial program, or otherwise rely on the parties' expertise.

ance with the Clean Water Act. Second, the remedy took into account the particular equities presented: the lack of perceptible environmental damage, the countervailing interest in national security, and the past conduct of the parties.

The district court found the Navy in violation of the Clean Water Act because it had failed to obtain an NPDES permit pursuant to Sections 301(a) and 402 of the Act, 33 U.S.C. 1311(a) and 1342. There was, however, no evidence that the Navy had violated any substantive limitation or standard under the Act other than the permit requirement. The district court found, and the court of appeals affirmed, that the Navy activity complied with Puerto Rico water quality standards (Pet. App. 18a-22a, 81a-86a). The EPA has not issued effluent limitations guidelines for occasional deposits of ordnance pursuant to Sections 301(b) and 304(b), 33 U.S.C. (Supp. III) 1311(b) and 1314(b). See *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 130-133 (1977). In fact, no effluent limitations guidelines have been promulgated for activities resembling depositing ordance unintentionally in coastal waters. See 40 C.F.R. Part 400 *et seq.*[23] In these circumstances, an injunction restraining the Navy activity would prohibit what the agency ad-

---

[23] In a somewhat similar situation, problems associated with the deposit of shot into the water by duck hunters who miss their targets have been regulated by the Secretary of the Interior under the Migratory Bird Treaty Act, 16 U.S.C. 703 *et seq.* See *National Rifle Association* v. *Kleppe*, 425 F. Supp. 1101 (D.D.C. 1976), aff'd, 571 F.2d 674 (D.C. Cir. 1978). The EPA aided the Department of the Interior in developing these regulations; there was no suggestion that duck hunters need an NPDES permit to comply with the Clean Water Act.

ministering the Clean Water Act ultimately may find acceptable in issuing an NPDES permit.[24]

Beyond the public interest in bringing the Navy into compliance with the Act, the purpose and policies of the Clean Water Act do not demand more rigorous remedial action. The district court found "no credible evidence * * * that any of the [Navy activities] has had any measurable deleterious effects * * * on the quality of the surrounding waters" (Pet. App. 80a), and concluded that "the activities of defendant Navy are not causing any appreciable harm to the Vieques ecology" (Pet. App. 162a). The evidence presented at trial established that the Navy's activity on Vieques—including the occasional, inadvertent release of ordnance into the coastal waters—does not adversely modify the ability of the waters to sustain animal or plant life through turbidity, sedimentation or changes in chemical composition (Pet. App. 80a, 115a-126a). The coral reef and seagrass systems in waters surrounding the island were found to be healthy, functioning components of the marine environment. In fact, the district court reached the overall conclusion that "the [Navy's] control of large area of Vieques probably constitutes a positive factor in its overall ecology" (Pet. App. 115a). More specifically, it noted that "these waters are as aesthetically acceptable as any to be found anywhere, and [respondents'] witnesses unanimously testified as to their being the best fishing grounds in Vieques" (Pet. App. 86a)[25] Therefore, the district court found

---

[24] Should the NPDES permit impose conditions or limitations that the Navy did not meet, additional remedial relief might then be appropriate. However, if those circumstances arose, we would expect the Navy to obtain an exemption. See note 30, *infra*.

[25] The court of appeals conceded that the record supports the district court's finding that the dropping of munitions

an immediate cessation order was not necessary to protect the aquatic environment.[26]

In addition, there are significant and exceptionally strong equitable considerations arguing against the imposition of a cessation order in this case. The district court properly declined to enter injunctive relief that would have a profound adverse impact on the ability of the Atlantic Fleet to satisfy its national security obligations. The Navy weapons training facilities in and around Vieques are unique in the Atlantic. They provide the Atlantic Fleet with the opportunity to train under conditions resembling actual combat. The quality of training experience offered by the Vieques facilities cannot be duplicated by use of other Navy target ranges (see pages 2-3, *supra*). Every vessel from the Atlantic Fleet assigned to active duty in the Mediterranean or the Indian Ocean must qualify its guns on the Vieques range (see Pet. App. 164a-165a).[27]

Finally, consideration of the actions of the parties does not suggest that an injunction immediately re-

---

into the water caused no significant harm to the environment (Pet. App. 48a-49a).

[26] The national interest in uniformity among classes and categories of discharges is not implicated in this case because the Navy activity is unique, and there is no possibility of the Navy obtaining an advantage over its competitors by failing to comply with the Clean Water Act.

[27] The statute itself recognizes that there may be situations in which the national security precludes compliance with the Act's requirements, and provides for a presidential exemption in such situations (33 U.S.C. (Supp. III) 1323(a)). That recognition strongly suggests that national security interests are a proper factor for the court to consider in fashioning appropriate relief where ultimate compliance with the statutory standards can be achieved and the agency has elected to comply with the Act rather than to seek an exemption.

straining Navy activity on Vieques is appropriate. The Navy has, in the past, applied for and received permits under the Clean Water Act for its activities which result in discharges into waters of the United States.[28] The EPA made several inspection visits to Vieques to ascertain the Navy's compliance with various environmental laws and the Puerto Rico Environmental Quality Board, respondent herein, communicated with the EPA concerning the Navy's compliance with the Act. Neither of the agencies suggested that a NPDES permit was required for the release of ordnance that may, inadvertently, fall into the coastal waters.

Nor did the respondents notify the Navy or the EPA of their claim of violation of the Clean Water Act prior to filing this suit despite the provisions of Section 505(b)(1)(A) of the Act, 33 U.S.C. 1365 (b)(1)(A).[29] After the district court decision, the

---

[28] These include NPDES permits for its wastewater treatment facilities at Camp Garcia on Vieques and at Roosevelt Roads Naval Station on Puerto Rico. It also obtained a permit for construction of a boat ramp on Vieques pursuant to Section 404 of the Clean Water Act, 33 U.S.C. (Supp. III) 1344 and Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403.

[29] Section 505(b)(1)(A), requires a sixty-day notice to the alleged violator and the EPA as a prerequisite for a citizen's suit to enforce the provisions of the Clean Water Act. See *Middlesex County Sewage Authority* v. *National Clammers Association*, No. 79-1711 (June 25, 1981), slip op. 6-7. The notice requirement was copied from the similar provision in the Clean Air Act Amendments of 1970, 42 U.S.C. (Supp. III) 7604. See *Legislative History* 820. The purpose of the notice requirement, as stated in the Clean Air Act legislative history, is to allow the administrative authorities time to act on the alleged violation. S. Rep. No. 91-1196, 91st Cong., 2d Sess. 37 (1970), *reprinted in A Legislative History of the Clean Air Act Amendments of 1970*, 93d Cong., 2d Sess. 437 (1974). A subsequent citizen's suit is to be considered "against

Navy expeditiously filed an application for a NPDES permit with the EPA (see page 6 note 5, *supra*). The delay in issuing the permit has been due to the need for the EPA to devise ad hoc conditions for the permit pursuant to Section 402(a), 33 U.S.C. (& Supp. III) 1342(a); it is also due to Puerto Rico's reluctance to certify compliance with local water quality standards under that Section. But see Pet. App. 18a-22a; 81a-86a.

This past conduct of the parties argues forcefully against imposition of an injunction requiring immediate cessation of Navy activity. The respondents made no efforts, formal or otherwise, to notify the Navy about, or seek a cure for, what they perceived to be a violation of the Act prior to invoking the equitable powers of the courts. The Navy, however, has shown itself willing to cooperate with environmental agencies and has offered no grounds for a belief that it will fail to comply with the standards those agencies develop. In these circumstances it is not equitable for the Navy alone to bear the burden of the delay attendant upon developing and approving an NPDES permit in this case.[30]

---

the background of the agency action" and such action could justify dismissal or suspension of the citizen's suit. *Ibid.*

In the present case, respondents filed suit without advance notice and then filed a supplemental complaint sixty days later to satisfy the jurisdictional requirements of Section 505, 33 U.S.C. 1365 (J.A. 71-72).

[30] The possibility of a presidential exemption pursuant to Section 313(a), 33 U.S.C. (Supp. III) 1323(a), does not alter this analysis. Section 313(a) authorizes the President to "exempt any effluent source of any department * * * in the executive branch from compliance with any * * * requirement if he determines it to be in the paramount interest of the United States to do so * * *." Exec. Order No. 12088, 43

In any event, should this Court harbor doubts as to the appropriateness of the district court's exercise of equitable discretion, the proper course would be to remand that issue to the court of appeals for consideration under the correct legal standards. In the decision below, the court of appeals did not find that the district court abused its discretion in fashioning relief, but that the lower court lacked discretion to decline to enter an injunction immediately restraining the violating activity (Pet. App. 48a-49a).[31] It is the court of appeals' erroneous application of the standards for injunctive relief derived from *TVA* v. *Hill*, *supra*, to these very different circumstances that must be reversed.

Fed. Reg. 47707, 47709 (1978), which implements the exemption authority, is designed to restrict exemptions to extraordinary circumstances. The EPA Administrator and the Director of the Office of Management and Budget are to mediate exemption requests submitted by agency heads. The federal agency is required to certify in the exemption request that it cannot meet the applicable pollution control standards. Exemptions are granted by the President only if the conflict between pollution control standards and crucial federal activities cannot be resolved through the development of a practicable remedial program.

If the possibility of an exemption alters the equitable balance so as to subject the agencies of the United States to automatic injunctions, it essentially shifts the burden of devising an equitable and practical remedial program from the courts to the Office of the President. In the absence of a clear congressional statement of intent, the courts should not abdicate their responsibility to fashion appropriate equitable relief.

[31] For this reason, respondents' apparent suggestion that the court of appeals merely applied traditional equitable principles "tempered by the obligation to carry out the statutory mandate" (Resp. Br. in Opp. 12) simply misreads the opinion below.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

ANTHONY C. LIOTTA
Acting Assistant Attorney General

EDWARD J. SHAWAKER
ANNE S. ALMY
Attorneys

CAPTAIN THOMAS E. FLYNN
Office of Judge Advocate General

RICHARD M. CORNELIUS
Assistant General Counsel
Department of the Navy

NOVEMBER 1981

★ U. S. GOVERNMENT PRINTING OFFICE: 1981 358134 690

Office - Supreme Court, U.S.
FILED
DEC 21 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1990

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CASPAR WEINBERGER *et al.*,
Petitioners,

v.

CARLOS ROMERO-BARCELO *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

BRIEF FOR THE RESPONDENTS

HECTOR REICHARD DE CARDONA
Secretary of Justice
Government of Puerto Rico

HOWARD CHARLES
Department of Justice
Government of Puerto Rico

GERARDO A. CARLO
Special Counsel to the Governor

JOHN A. HODGES
(Counsel of Record)
TIMOTHY L. HARKER
LAWRENCE WHITE
JEFFREY N. MARTIN
PEABODY, LAMBERT & MEYERS
A Professional Corporation
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 457-1000

Counsel for the Respondents

December 21, 1981

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED FOR REVIEW

Whether this Court should overturn a unanimous decision by the United States Court of Appeals for the First Circuit ordering a federal facility to comply with the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* (1976 & Supp. III 1979), by ceasing to discharge pollutants into the navigable waters of Puerto Rico until it either obtains the permit required by the Act or a Presidential exemption from the permit requirement as specified in the Act?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	v
STATUTE INVOLVED	1
STATEMENT OF THE CASE	1
I. NATURE OF THE CASE	1
A. The Statutory Scheme of the Federal Water Pollution Control Act	3
B. The Island of Vieques	4
C. Navy Activities on Vieques	4
II. PROCEEDINGS IN THE TRIAL COURT	7
III. PROCEEDINGS IN THE COURT OF APPEALS	11
SUMMARY OF ARGUMENT	16
ARGUMENT	16
I. WHERE A FEDERAL STATUTE IS BEING VIOLATED THE EQUITABLE DISCRETION OF A COURT IS TO BE USED TO ENSURE FULL COMPLIANCE	16
A. A Court Does Not Have Equitable Discretion to Permit a Continuing Violation of a Federal Statute	16
1. The Standard Derived from Litigation Between Private Parties Does Not Apply to the Issuance of Injunctive Relief for Violations of Federal Statutes	16
2. A Consistent Line of Supreme Court Decisions Precludes the Exercise of Equitable Discretion to Permit a Continuing Violation of a Federal Statute	18

TABLE OF CONTENTS—Continued

Page

B. The Court Below Correctly Ruled that the Trial Court Erred by Refusing to Enjoin the Navy's Ongoing Violation of the FWPCA.... 27

II. INJUNCTIVE RELIEF IS REQUIRED IN THIS CASE TO ENFORCE THE REQUIREMENTS OF THE FEDERAL WATER POLLUTION CONTROL ACT 28

A. Introduction 28

B. The Permit Requirement Reflects Congress' Express Intention to Prohibit Point-Source Discharges Made Without a Permit 30

C. The Mandatory Administrative Review and Compliance Schemes Specified in the FWPCA Preclude Equitable Discretion to Allow an Ongoing Violation of the Permit Requirement 35

D. The Legislative History of the FWPCA Manifests a Clear Congressional Intent that Federal Facilities Fully Comply with the Act 43

1. Federal Facilities are to Serve as a Model for Compliance with the Act 43

2. The Presidential Exemption is the Mechanism that Must be Used by Federal Facilities to Authorize Discharges Without an NPDES Permit 44

CONCLUSION 48

STATUTORY APPENDIX

TABLE OF AUTHORITIES

CASES: Page

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 21, 22
Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) 26
Arlington Coalition on Transportation v. Volpe, 458 F. 2d 1323 (4th Cir.), *cert. denied sub nom. Fugate v. Arlington Coalition on Transportation*, 409 U.S. 1000 (1972) 26
Bethlehem Steel Corp. v. Train, 544 F. 2d 657 (3d Cir. 1976), *cert. denied*, 430 U.S. 975 (1977) 34
Carter v. Colon, 633 F. 2d 964 (1st Cir. 1980) 46
City of Milwaukee v. Illinois, —— U.S. ——, 49 U.S.L.W. 4445 (1981) 30, 33, 34, 35, 42
City of New York v. United States, 337 F. Supp. 150 (E.D.N.Y. 1972) 14
Commodity Futures Trading Comm'n v. British American Commodity Options Corp., 560 F. 2d 135 (2d Cir. 1977) 25, 27
Commodity Futures Trading Comm'n v. Hunt, 591 F. 2d 1211 (7th Cir.), *cert. denied*, 442 U.S. 921 (1979) 25
Cooper v. Wisdom, 440 F. Supp. 1027 (S.D. Fla. 1977) 35
E.I. Dupont de Nemours & Co. v. Train, 430 U.S. 112 (1977) 29, 30
EPA v. National Crushed Stone Ass'n, 449 U.S. 64 (1980) 36
EPA v. State Water Resources Control Board, 426 U.S. 200 (1976) 34
Gee v. Pritchard, 2 Swanston 403, 36 Eng. Rep. 670 (1818) 22
Hecht Co. v. Bowles, 321 U.S. 321 (1944) ..... *passim*
Henderson v. Burd, 133 F. 2d 515 (2d Cir. 1943) 26
Holmberg v. Armbrecht, 327 U.S. 392 (1946) 21
Lathan v. Volpe, 455 F. 2d 1111 (9th Cir. 1971) 26
Leonardo v. Leonardo, 145 F. 2d 849 (D.C. Cir. 1944) 17

TABLE OF AUTHORITIES—Continued

Page

Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, —— U.S. ——, 49 U.S.L.W. 4783 (1981) 29, 42
Natural Resources Defense Council, Inc. v. Costle, 568 F. 2d 1369 (D.C. Cir. 1977) 34
National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers, 414 U.S. 453 (1974) 44
Petroleum Exploration, Inc. v. Public Service Comm'n of Kentucky, 304 U.S. 209 (1938) 16
Realty Income Trust v. Eckerd, 564 F. 2d 447 (D.C. Cir. 1977) 14, 41
Reserve Mining Co. v. EPA, 514 F. 2d 492 (8th Cir. 1975) 31
Romero-Barceló v. Weinberger, Civ. A. No. 78-323 (TR) (D.P.R.) 2
Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975) 22, 24, 27
Save Our Sound Fisheries Ass'n v. Callaway, 387 F. Supp. 292 (D.R.I. 1974) 34, 35
SEC v. Advance Growth Capital Corp., 479 F. 2d 40 (7th Cir. 1972) 26
State of Alaska v. Andrus, 580 F. 2d 465 (D.C. Cir.), *vacated in part sub nom. Western Oil & Gas Ass'n v. Alaska*, 439 U.S. 922 (1978) 41
Studebaker Corp. v. Gittlin, 360 F. 2d 692 (2d Cir. 1966) 26
Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978) ..... *passim*
Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1 (1976) 34
Transamerica Mortgage Advisors, Inc. v. Lewis, 44 U.S. 11 (1979) 30
United States v. City and County of San Francisco, 310 U.S. 16 (1940) 18, 19, 27, 41
United States v. City of Painesville, Ohio, 644 F. 2d 1186 (6th Cir. 1981) 26
United States v. Earth Sciences, Inc., 599 F. 2d 368 (10th Cir. 1979) 34, 36

TABLE OF AUTHORITIES—Continued

Page

United States v. Holland, 373 F. Supp. 665 (M.D. Fla. 1974) 34

United States v. Kennebec Log Driving Co., 491 F. 2d 562 (1st Cir. 1973), *on remand*, 399 F. Supp. 754 (D. Me. 1975), *aff'd*, 530 F. 2d 446 (1st Cir. 1976), *cert. denied*, 429 U.S. 821 (1977) 32

United States v. Rohm & Haas Co., 500 F. 2d 167 (5th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975) 32

United States v. W.T. Grant Co., 345 U.S. 629 (1953) 22

United States ex rel. Greathouse v. Dern, 289 U.S. 352 (1933) 41

United Steelworkers of America v. United States, 361 U.S. 39 (1959) 20, 21

West Virginia Division of Izaac Walton League v. Butz, 522 F. 2d 945 (4th Cir. 1975) 26

Wilderness Society v. Morton, 479 F. 2d 842 (D.C. Cir.) (en banc), *cert. denied*, 411 U.S. 917 (1973) 25, 26

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 18, 20

STATUTES, EXECUTIVE ORDERS AND REGULATIONS:

Clean Air Act, 42 U.S.C. § 7401 *et seq.* (1976 & Supp. II 1978) 43

Commodity Exchange Act, § 6c, 7 U.S.C. § 13a-1 (1976) 25

Emergency Price Control Act of 1942, 56 Stat. 23, 50 Stat. 23, 50 U.S.C.A. App. § 901 *et seq.* (1951) 19

Endangered Species Act of 1973, 16 U.S.C. § 1531 *et seq.* (1976 & Supp. IV 1980) 7, 13, 44

§ 7, 16 U.S.C. § 1536 (1976) 13

Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* (1976 & Supp. III 1979) ..... *passim*

Section 301, 33 U.S.C. § 1311 (1976 & Supp. III 1979) 2, 3, 14, 33, 34, 44

TABLE OF AUTHORITIES—Continued

Page

Section 302, 33 U.S.C. § 1312 (1976) 44
Section 309, 33 U.S.C. § 1319 (1976 & Supp. III 1979) 39, 40, 41
Section 313, 33 U.S.C. § 1323 (1976 & Supp. III 1979) 2, 4, 15, 44
Section 401, 33 U.S.C. § 1341 (1976 & Supp. III 1979) 39
Section 402, 33 U.S.C. § 1342 (1976) 3, 14, 33, 34, 39
Section 403, 33 U.S.C. § 1343 (1976 & Supp. III 1979) 3
Section 502, 33 U.S.C. § 1362 (1976 & Supp. III 1979) 3
Section 505, 33 U.S.C. § 1365 (1976) 15
Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972) .. 30, 33
Military Construction Authorization Act of 1971, Pub. L. No. 91-511, 84 Stat. 1204 (1970) 5
Military Construction Authorization Act of 1972, Pub. L. No. 92-145, 85 Stat. 394 (1971) 5
Military Construction Authorization Act of 1974, Pub. L. No. 93-166, 87 Stat. 668 (1973) 5
Mineral Leasing Act, Pub. L. No. 93-153, 87 Stat. 576 (1973) 26
National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* (1976) 7, 9, 12, 24
National Historic Preservation Act of 1966, 16 U.S.C. § 470 *et seq.* (1976 & Supp. IV 1980), as amended by the National Historic Preservation Act Amendments of 1980, Pub. L. No. 96-515, 94 Stat. 2987 (1980) 7, 9, 12
Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. § 401 *et seq.* (1976) 30, 31, 32
Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 (1965), formerly codified at 33 U.S.C. § 1511 *et seq.* (superseded by the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972)) .. 30, 31, 32, 40, 41

TABLE OF AUTHORITIES—Continued

	Page
Williams Act, 15 U.S.C. § 78m *et seq.* (1976 & Supp. IV 1980)	22
Executive Order 11593, 36 Fed. Reg. 8921 (1971), *reprinted in* 16 U.S.C.A. § 470, at 28 (1974)	9
50 C.F.R § 402 (1981)	13
43 Fed. Reg. 870 (Jan. 4, 1978)	13
45 Fed. Reg. 66443 (Oct. 7, 1980)	46
LEGISLATIVE HISTORY:	
A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess. (1973) (2 vols.)	30, 31, 34, 37
Conference Report, H.R. Rep. No. 92-1465, 92d Cong., 2d Sess. (1972)	40
S. Rep. No. 91-1196, 91st Cong., 2d Sess. (1970)	43
S. Rep. No. 92-414, 92d Cong., 1st Sess. (1971)	*passim*
H.R. Rep. No. 92-911, 92d Cong., 2d Sess. (1972)	33, 40, 41, 43
116 Cong. Rec. 19205 (1970)	43
117 Cong. Rec. 38805 (1971)	34
117 Cong. Rec. 38833 (1971)	31
118 Cong. Rec. 10780 (1972)	31
118 Cong. Rec. 33693 (1972)	36
TREATISES AND OTHER AUTHORITIES:	
Developments in the Law—Injunctions, 78 Harv. L. Rev. 994 (1965)	16, 17
Fiss, O., *Injunctions* (1972)	17
Maitland, F., *Equity* (2d rev. ed. 1936)	17
7 *Moore's Federal Practice* ¶ 65.18[3] (3d ed. 1980)	41
Plater, Z., *Statutory Violations and Equitable Discretion* (unpublished manuscript)	16
Story, J., *Equity Jurisprudence* (1st ed. 1836)	16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-1990

CASPAR WEINBERGER *et al.*,
Petitioners,

v.

CARLOS ROMERO-BARCELO *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

BRIEF FOR THE RESPONDENTS

Carlos Romero-Barceló, the Governor of Puerto Rico, on behalf of the Government of Puerto Rico, the Board on Environmental Quality of Puerto Rico, and the mayor of the island municipality of Vieques (referred to collectively as "Puerto Rico"), hereby respond to the brief filed on behalf of the Secretary of Defense and officials of the Department of the Navy (referred to collectively as "the Navy"). Puerto Rico respectfully asks this Court to affirm the judgment of the court below.

STATUTE INVOLVED

The pertinent provisions of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* (1976 & Supp. III 1979), are reprinted in the Statutory Appendix herein.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

In this case the Navy challenges the unanimous determination by the Court of Appeals for the First Circuit that a federal facility must halt a continuing violation of

the prohibition in the Federal Water Pollution Control Act[1] against the discharge of munitions into navigable waters without either obtaining a National Pollution Discharge Elimination System (NPDES) permit from the Environmental Protection Agency or securing a Presidential exemption from the statutory permit requirement as provided under the Act. The Navy discharges bombs, naval gunfire shells and other forms of ordnance into the navigable waters surrounding Vieques. Both the trial court and the Court of Appeals found that the Navy, by discharging such munitions without first obtaining the required permit or a Presidential exemption, is engaging in a continuing violation of the Act.

The Navy does not dispute that it has violated the Act and continues to do so.[2] Instead, characterizing its conduct as a "technical" violation of the Act[3]—a characterization specifically rejected by the Court of Appeals—the Navy challenges the remedy imposed by that court: an injunction requiring the Navy to obey the express prohibition in Sections 301(a) and 313(a) of the Act[4] against discharges of munitions into navigable waters without a permit or a Presidential exemption from the permit requirement.

---

[1] 33 U.S.C. § 1251 *et seq.* (1976 & Supp. III 1979) (referred to hereinafter as the "FWPCA" or the "Act").

[2] The Navy recently admitted that it discharged at least 1,043 bombs and shells into the coastal waters of Vieques during the first seven months of 1981. *See* Affidavit of Edward Clark, August 26, 1981, and "Splash Chart" attached thereto, filed August 27, 1981, in Romero-Barceló v. Weinberger, Civ.A.No. 78-323(TR)(D.P.R.).

[3] *Cf.* Navy's Petition for a Writ of Certiorari, Appendix C, p. 162a. As used herein, the abbreviation "Navy Pet." refers to the Navy's petition for a writ of certiorari; the abbreviation "Navy Br." refers to the Navy's brief on the merits in this Court; the abbreviation "C.A.J.A." refers to the Joint Appendix filed by the parties in the Court of Appeals; and the abbreviation "S.C.J.A." refers to the Joint Appendix filed by the parties in this Court.

[4] 33 U.S.C. §§ 1311(a), 1323(a) (1976 & Supp. III 1979).

In this case, the Navy in effect is requesting this Court to create an exception to "a particular course consciously selected by the Congress." *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 195 (1978). We urge this Court to reject this effort to end-run the explicit requirements laid down by Congress.

A. The Statutory Scheme of the Federal Water Pollution Control Act

The FWPCA expressly prohibits the discharge of any "pollutant" from a "point source" into the "navigable waters" of the United States without a permit issued by the Environmental Protection Agency ("EPA") or a state with an EPA-approved permit program.[5] The Act defines the term "pollutant" to include "munitions" and "wrecked or discarded equipment." The term "point source" is defined to include vessels and other conveyances from which pollutants may be discharged.[6] Under the statutory scheme, bombs, shells and other munitions discharged into the navigable waters around Vieques are subject to the strictures of the Act.

In the words of the trial court, the language of the Act is "unambiguous."[7] The framers of the Act specifically singled out the Department of Defense as an agency obligated to pay special attention to the statutory prohibitions against discharging pollutants.[8]

Congress provided an explicit provision for exemption from the permit requirement for federal facilities. Congress empowered the President to exempt any department, agency, or instrumentality in the Executive Branch from compliance with the statutory prohibition

---

[5] FWPCA §§ 301, 402, 403, 502(6), (7), (8), (12), (14), (16), 33 U.S.C. §§ 1311, 1342, 1343, 1362(6), (7), (8), (12), (14), (16) (1976 & Supp. III 1979).

[6] FWPCA §§ 502(6), (14), 33 U.S.C. §§ 1362(6), (14) (1976 & Supp. III 1979).

[7] Navy Pet. 80a.

[8] S. Rep. No. 92-414, 92d Cong., 1st Sess. 80 (1971).

against the discharge of pollutants "if he determines it to be in the paramount interest of the United States to do so." Congress also authorized the President to issue regulations specifically exempting classes of military property from the same statutory prohibition.[9]

B. The Island of Vieques

Vieques is a small island lying approximately six miles off the southeastern coast of Puerto Rico. It is approximately twenty miles long and varies in width from several hundred yards to slightly more than four miles. Nine thousand United States citizens live there.

Vieques and the surrounding waters constitute an unusual coastal ecosystem that includes coral reefs and seagrasses, mangroves, spectacular and environmentally fragile bioluminescent bays, endangered sea turtles, brown pelicans and manatees, and valuable archeological and historical resources.[10] Vieques has a long and varied cultural history.[11]

During the early 1940's the Navy acquired title to over 79 percent of the land on Vieques and currently uses this land as one of the areas that comprise the Atlantic Fleet Weapons Range.[12]

C. Navy Activities on Vieques

From 1939 to 1970, the air-to-ground and ship-to-shore training conducted by the Navy in the Atlantic Fleet Weapons Range was almost entirely aimed at targets on Culebra, a sparsely inhabited island located nine miles to the north of Vieques. Navy activity on Vieques before the 1970's was relatively insubstantial. Vieques was used principally for small-scale artillery training.[13]

---

[9] FWPCA § 313(a), 33 U.S.C. § 1323(a) (1976 & Supp. III 1979).

[10] Navy Pet. 2a-3a. *See generally* C.A.J.A. 191-92, 340-45.

[11] C.A.J.A. 86-87, 144, 340-44.

[12] Navy Pet. 4a.

[13] C.A.J.A. 541-46, 551, 557-59, 1309-70, 1375, 1385, 1388-89, 1490-98.

By 1970, significant civilian and governmental opposition had developed to the military operations on Culebra. This opposition was voiced not only in Puerto Rico but in the mainland United States. Consequently, Congress arranged through three different Military Construction Authorization Acts in the early 1970's for the curtailment of Navy activities on Culebra.[14]

In 1971, the Navy began to increase its ship-to-shore shelling ("naval gunfire support") and air-to-ground bombing at Vieques.[15] Between 1974 and 1977, the Navy increased by over *900 percent* the number of 500 (MK82), 1,000 (MK83), and 2,000 (MK84) pound bombs dropped on and around Vieques. In 1977 alone, the Navy dropped approximately 5 million pounds of ordnance on and around Vieques.[16]

The Navy's bombing, shelling, and other military activities have resulted in the discharge of munitions and other pollutants into the coastal waters of Vieques, and have caused damage to fragile coral reefs, seagrasses, beaches, lagoons and other marine habitats and organisms.[17] By the Navy's own admission, the beaches and

---

[14] Military Construction Authorization Act of 1971, Pub. L. No. 91-511, 84 Stat. 1204 (1970); Military Construction Authorization Act of 1972, Pub. L. No. 92-145, 85 Stat. 394 (1971); Military Construction Authorization Act of 1974, Pub. L. No. 93-166, 87 Stat. 668 (1973). In 1975, the Navy ceased its Culebra operations.

[15] C.A.J.A. 521-22, 533, 538, 547-48, 552. The Navy knew that the increase of bombing and shelling on the more populous Vieques was likely to spark substantial opposition. In a confidential communique in December, 1971, a Navy official wrote that the Navy should be very careful not to appear to increase the tempo of training operations on Vieques. An internal Navy memorandum in April, 1972, warned that because of the "extreme sensitivity" of any plan for increasing bombing and shelling at Vieques, all Navy message traffic on the subject should be "flagged limited distribution special handling." S.C.J.A. 106; *see also* C.A.J.A. 1054, 1056, 1413; *see generally* S.C.J.A. 97-185.

[16] S.C.J.A. 73-74; C.A.J.A. 1490-98, 1782-94, 1796-1952.

[17] C.A.J.A. 256-64, 281-329.

waters surrounding Vieques are "saturated" with ordnance and some areas are "supersaturated".[18]

The Navy knew long ago of the damage that would be inflicted on the marine environment of Vieques by an increase of bombing and shelling there. A report prepared for the Navy in 1972 warned that expanded range use on Vieques "would cause a subtle and adverse impact [on] the total marine environment of these waters." The report warned that coral reefs in Vieques coastal waters would be irreparably damaged. "Although much of the resulting ecological damage may be repaired by nature in time, some damage to coastal zones, and reef systems in particular, is irreparable." [19]

---

[18] C.A.J.A. 703-04, 757-60, 810-12, 1518-52, 1603-19. Items discovered in the waters of Vieques near the reefs include exploded and unexploded bombs and shells, practice ordnance, parachutes, parachute cables, flares, flare casings, barges and other military vessels, machine gun rounds, bazooka rockets and many unidentifiable ordnance fragments. C.A.J.A. 1782-1952; S.C.J.A. 76-91. As stated by one of the Navy's witnesses at trial:

> The fringing reefs on both sides of the north central cove in Bahia Salina del Sur have been extensively bombed. Several craters in the reefs are visible in recent color aerial photos (flown August 1978 by the U.S. Navy).

S.C.J.A. 84-85.

During the trial, a shell fired from a Navy destroyer at Vieques missed its intended target by about six miles; the shell landed near a private vessel. C.A.J.A. 2738. The Navy admits that

> in view of the *large amount of live ordnance dropped in the water in the Surface Danger Area surrounding eastern Vieques and the resultant amount of unexploded ordnance ending up on the ocean bottom*, it should be considered paramount for safety that steps be taken to forbid at all times, diving, anchoring, bottom fishing and trapping within at least one mile of the Vieques coast inside the Surface Danger Area.

S.C.J.A. 76 (emphasis added).

[19] C.A.J.A. 284-85. "Aerial and ship-to-shore bombardment of impact zones is usually accompanied by some ordnance falling long or short of the target areas. The potential adverse impact from this threatens damage to thalassia [*i.e.*, seagrass] grass beds and

The Navy did not prepare an environmental impact statement with respect to its activities on Vieques as required by the National Environmental Policy Act.[20] It did not conduct a survey to locate historical sites or nominate sites for inclusion in the National Register of Historic Places, as required by the National Historic Preservation Act of 1966.[21] It did not consult with the Departments of Interior and Commerce as required by the Endangered Species Act or identify the existence of endangered species, as required by its own rules issued pursuant to the Endangered Species Act.[22] And it did not obtain an NPDES permit or a Presidential exemption for its discharges of munitions into the coastal waters of Vieques, as required by the FWPCA.

II. PROCEEDINGS IN THE TRIAL COURT

In an effort to compel the Navy to comply with the requirements of these and other statutes, Puerto Rico brought suit in the United States District Court for the District of Puerto Rico on March 1, 1978, against the Navy.

The location of Naval facilities on Vieques and the nature of Navy activity there made it difficult for experts to assemble evidence concerning the impact of the Navy's activities on the marine environment. Navy ex-

---

mangrove zones . . . . Direct fish kills from the impact of stray ordnance may be expected, however, a more serious consequence is the long-term damage to aquatic life forms resulting from the explosive destruction of habitat, turbidity that reduces the photosynthesis in turtle grass zones [*i.e.*, seagrass] and the sedimentation of live coral systems." S.C.J.A. 77.

For a discussion of the importance of coral reefs and seagrass in the marine ecosystem, see C.A.J.A. 281, 316-17.

[20] 42 U.S.C. § 4321 *et seq.* (1976).

[21] 16 U.S.C. § 470 *et seq.* (1976 & Supp. IV 1980), as amended by the National Historic Preservation Act Amendments of 1980, Pub. L. No. 96-515, 94 Stat. 2987 (1980).

[22] 16 U.S.C. § 1531 *et seq.* (1976 & Supp. IV 1980). *See* OPNAVINST 6240.3E § 10702, C.A.J.A. 2370-71.

plosives experts stated that "no one should be allowed there [*i.e.*, at "the reef"] because the risks of losing life or limb is more than 80 percent." [23] Puerto Rico experts were given permission to inspect coral reefs only after signing affidavits prepared by the Navy entitled "Acknowledgment of Danger(s) and Assumption of the Risk." The affidavits stated that "the Waters contain unexploded ordnance which could detonate and cause death or injury if inadvertently activated." [24] Furthermore, the Navy's shelling and bombing schedule limited the opportunities for inspection of the marine environment.

The trial commenced in September, 1978, and lasted three months and involved highly conflicting testimony about the effect of Navy activity on the marine environment.

The trial court concluded that "there is no question . . . but that there was an increase in the intensity of operations at Vieques after 1975." [25] As a result, ordnance falls into the coastal waters of Vieques "with some frequency," [26] causing damage to coral reefs and seagrass beds.[27]

Despite the evidence of substantial discharges of ordnance into navigable waters, the trial court found that Puerto Rico had not proven that the Navy's activities had yet irreparably damaged the marine environment. "At present," the court concluded, "there is no irreparable damage to coral reefs in Vieques and what damage does exist can be repaired by the reefs' normal growth processes. . . . [T]he damage to seagrass from the activities of Defendant Navy is neither substantial, permanent nor

---

[23] Transcript of Hearing before district court, April 10, 1978, p. 156.

[24] C.A.J.A. 1604-1605.

[25] Navy Pet. 148a. The Navy's reprint of the trial court's finding concerning the 1977 hours of naval gunfire (*id.*) contains a typographical error. The correct number of hours is 1016.9, not 106.9.

[26] Navy Pet. 79a.

[27] *Id.* 116a-117a, 120a, 148a.

irreversible." [28] With respect to the Vieques beaches, the court concluded merely that "the evidence is at best inconclusive that these activities have a *substantial* negative ecological impact on these beaches." [29]

By opinion and order dated September 17, 1979, the district court ruled in favor of Puerto Rico on three of its major claims. The court found that the Navy had violated the National Environmental Policy Act of 1969 [30] by failing to file an environmental impact statement for its activities on Vieques, and had violated the National Historic Preservation Act of 1966 and an implementing Executive Order by failing to nominate historic sites for inclusion in the National Register of Historic Places.[31]

The trial court also found that the Navy violated the FWPCA by discharging munitions into navigable waters without first obtaining an NPDES permit from the EPA. This ruling was based upon the "unambiguous language" of the Act.[32]

At the conclusion of its opinion, the court addressed the question of the remedy for the Navy's violations

---

[28] Navy Pet. 116a, 121a.

[29] Navy Pet. 125a (emphasis in original).

[30] 42 U.S.C. § 4321 *et seq.* (1976).

[31] *See* Executive Order 11593, 36 Fed. Reg. 8921 (1971), *reprinted in* 16 U.S.C.A. § 470 at 28 (1974). With respect to the Navy's nonfeasance prior to the filing of the complaint, the court noted:

> There is little doubt in our mind but that Defendant Navy did not at any time prior to the commencement of the present actions locate, inventory and/or nominate any site or otherwise that appear to qualify for listing on the National Register, as required by Section 2(a) of the Executive Order.

Navy Pet. 136a. The Executive Order required locating, inventorying and nomination of historic sites by July 1, 1973. The Navy, therefore, should have located, inventoried and nominated historic sites on Vieques by that date, almost five years before Puerto Rico filed its complaint in this action.

[32] Navy Pet. 79a-80a. The court dismissed the remaining counts in the complaint.

of federal law. The court began its analysis by observing that:

> the issuance of an injunction in the federal courts is governed by general principles of equity. . . .
>
> Perhaps the most significant single component in the judicial decision whether to exercise equity jurisdiction and grant permanent injunctive relief, is the court's discretion. Being an extraordinary remedy, it is not granted routinely.[33]

The court then cited this Court's decision in *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944), as authority.[34] But the court did not analyze the precise holding in *Hecht* and did not acknowledge the significant factual distinctions between that case and this. The court failed to recognize that the Court in *Hecht* was speaking in the context of a case where the violator had voluntarily complied with the statute in question and where there was no likelihood of continuing violation and, therefore, no need for an injunction to carry out the terms of the statute. The trial court also did not acknowledge the existence of this Court's admonition in *Hecht* that where a federal statute is involved judicial discretion "must be exercised in light of the large objectives of the Act. For the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in these cases." 321 U.S. at 331.

In discussing the remedy to be issued, the trial court did not focus on the requirements of each violated statute or on the necessity of an injunction to prevent a continuing violation of a federal statute. Instead, it "balanced" different considerations to determine whether injunctive relief should be issued.

The court stated that the activities of the Navy were "not causing any appreciable harm to the Vieques

---

[33] Navy Pet. 160a.

[34] *Id.*

ecology," and that injunctive relief would be merely "punishment." [35] It indicated that the fact that Puerto Rico had not sued earlier was a reason not to issue an injunction.[36] Finally, the court discussed at considerable length military and national security considerations, noting that "a well trained and effective naval force, even in time of peace, is essential to the National welfare." [37] This discussion was based upon the trial testimony of Navy personnel and upon "judicial notice of the present state of World affairs." [38] The court then determined that it would be in the best interests of the United States not to enjoin any of the Navy's military activities.

The court ordered the Navy to proceed "with all deliberate speed" to "[f]ile for and seek a NPDES permit for the release or firing into the waters of Vieques," to nominate historic sites to the National Register of Historic Places, and to file an environmental impact statement.[39]

III. PROCEEDINGS IN THE COURT OF APPEALS

The Navy did not appeal from any portion of the trial court's ruling, including the court's finding that the Navy had violated the FWPCA.[40] Puerto Rico appealed from portions of the decision to the United States Court of Appeals for the First Circuit. Puerto Rico specifically requested reversal of the trial court's refusal to issue injunctive relief with respect to the Navy's continuing violation of the FWPCA.

On January 26, 1981, the Court of Appeals issued its decision. The Court of Appeals separately discussed the remedies ordered for the Navy's violations of the

---

[35] *Id.* 162a.

[36] *Id.* 162a-163a.

[37] *Id.* 164a.

[38] *Id.* 174a.

[39] *Id.* 165a.

[40] *Id.* 49a.

National Historic Preservation Act, NEPA, the Endangered Species Act, and the FWPCA.

A. *National Historic Preservation Act.* The Court of Appeals rejected the trial court's conclusion that the Navy had no further obligation to locate historic sites in addition to those located in the survey conducted after the commencement of the lawsuit. However, the Court of Appeals found that it was not necessary to enjoin the Navy's training activities in the interim. "Nothing in the present record suggests that the training activities as a whole endanger the additional sites likely to be located." [41] The court accordingly observed that an injunction with respect to the Navy's bombing and shelling activities was not necessary to put the Navy into compliance with its obligations under the National Historic Preservation Act to locate and nominate sites and mitigate damage to historic sites. Compliance could be effected by making further efforts to locate historic sites, by nominating known and discovered historic sites for inclusion in the National Register of Historic Places, and by protecting these sites.[42]

B. *NEPA.* In its review of the trial court's remedy for the Navy's violation of the National Environmental Policy Act, the Court of Appeals declared the issue moot. The Navy had prepared and filed a final environmental impact statement by the time the case was argued in the Court of Appeals. Accordingly, no injunction was necessary to put the Navy into compliance with NEPA, and the court found that it did not need to address the issue of whether the Navy's activities should have been halted for failure to prepare and file an EIS.[43]

---

[41] *Id.* 50a. The trial court also had found that there were no significant archeological sites in the target areas because "[a]ny that may have existed there have in all probability been destroyed." *Id.* 137a.

[42] Navy Pet. 49a-50a.

[43] *Id.* 50a.

C. *Endangered Species Act.* The Court of Appeals found that the Navy had violated Section 7 of the Endangered Species Act [44] by failing to obtain a biological opinion (pursuant to that Section's consultation requirement) that discussed the impact of its training activities upon endangered and threatened species on Vieques.[45] The Court of Appeals noted that although the Navy had obtained a biological opinion after the decision of the trial court, this opinion was not in the record and therefore could not be reviewed by the Court of Appeals. The court remanded the entire issue of compliance with the Endangered Species Act to the trial court to allow Puerto Rico to challenge the biological opinion and to let the trial court consider Puerto Rico's claims under the Act in the light of the biological opinion.[46]

D. *FWPCA.* The Court of Appeals clearly recognized that the Navy's failure to obtain an NPDES permit

---

[44] Endangered Species Act of 1973, § 7, 16 U.S.C. § 1536 (1976).

[45] Navy Pet. 50a. The court stated:

> By ignoring the statutory mandate, the Navy has sidestepped the administrative process that Congress expected would resolve many of the conflicts between agency action and the requirements of § 7. If the Navy had sought consultation within a reasonable period following the adoption of the Act, the burden of litigating Puerto Rico's claim might have been avoided.

Id. 40a.

The Court of Appeals indicated that a biological opinion could alter the district court's conclusions about the Navy's compliance with certain of its obligations under the Act. *Id.* 41a.

It bears note that to assist agencies to comply with the consultation requirements of Section 7 of the Act, procedures had been set forth in "Guidelines to Assist the Federal Agencies in Complying with Section 7 of the Endangered Species Act of 1973". (April 22, 1976), which were referenced in the Navy's own rules. OPNAVINST 6240.3E § 10702, C.A.J.A. 2371. *See also* 50 C.F.R. § 402 (1981); 43 Fed. Reg. 870 *et seq.* (Jan. 4, 1978). The Navy did not initiate consultation with the United States Fish and Wildlife Service until the summer of 1979.

[46] Navy Pet. 51a.

presented a problem different from that involved with the Navy's other violations. Here, the court was confronted with an issue that was not moot and with an admitted and ongoing statutory violation.

As to this continuing violation, the Court of Appeals ruled that "the district court erred in undertaking a traditional balancing of the parties' competing interests." [47] The court continued:

> Congress has prohibited "the discharge of any pollutant," 33 U.S.C. § 1311(a), which includes the Navy's dropping of ordnance into the coastal waters, unless a NPDES permit has been secured pursuant to 33 U.S.C. § 1342. Whether or not the Navy's activities in fact harm the coastal waters, it has an absolute statutory obligation to stop any discharges of pollutants until the permit procedure has been followed and the Administrator of the Environmental Protection Agency, upon review of the evidence, has granted a permit.[48]

To the Court of Appeals, the statute made it irrelevant that "*on this record*" the trial court did not "clearly err" in finding that the Navy's discharge of munitions caused no significant harm to the environment.[49] The statutory scheme clearly contemplated that the Administrator of the EPA—not the court—was responsible for determining whether particular discharges caused harm to the environment. Furthermore, the court's review of the record indicated that the permit process would not be a mere formality:

> The EPA might find substantial harm even though the court had not. . . . [T]he permit process "might reveal substantial environmental consequences," *City of New York v. United States*, 337 F. Supp. 150, 160 (E.D.N.Y. 1972), *quoted in Realty Income Trust v. Eckerd*, 564 F.2d at 456, that would lead the Admin-

---

[47] *Id.* 48a.

[48] *Id.*

[49] *Id.* 49a (emphasis added).

istrator to deny the application or grant only a limited permit.[50]

The court specifically rejected the trial court's characterization of the Navy's conduct as a "technical violation" of the Act. The court also noted that "the Navy has utterly disregarded the statutory mandate."[51] The court further observed that because the statutory prohibition against the discharge of pollutants can only be lifted by having a permit, the mere filing of an *application* for the permit would not put the Navy into compliance with the Act.[52]

The Court of Appeals also dismissed the trial court's reliance upon national security considerations as a reason for refusing to carry out the express requirements of the Act. The Court of Appeals indicated that Congress had expressly addressed and resolved the matter of national security in the FWPCA by providing for Presidential exemptions. If an injunction would jeopardize Navy preparedness, then the Navy "is free to request the President to exempt it from the NPDES requirements in the interest of national security. *See* 33 U.S.C. § 1323(a)."[53]

The Court of Appeals then vacated the trial court's order and remanded with narrow instructions to order the Navy "to take all steps to insure that no ordnance

---

[50] *Id.* 48a-49a.

[51] *Id.* 49a.

[52] *Id.*

[53] *Id.* In a lengthy footnote at page 24 and 25 of its brief, the Navy lamely suggests that its failure to comply with the permit requirement was attributable in part to Puerto Rico's failure to provide it with the sixty-day notice provided in Section 505(b)(1)(A) of the FWPCA, 33 U.S.C. § 1365(b)(1)(A) (1976), as a prerequisite to a citizens suit to enforce the Act. Puerto Rico did comply with the notice requirement by serving the Navy with notice and thereafter filing an unopposed motion for leave to file a supplemental complaint. The district court ruled that Puerto Rico had satisfied the notice requirement. C.A.J.A. 71. The Navy did not appeal this ruling.

is discharged into the coastal waters of Vieques until such time as it obtains a NPDES permit." [54]

SUMMARY OF ARGUMENT

The Navy has long flouted the permit requirements of the FWPCA. The text, legislative history and judicial construction of the Act convincingly illustrate that a permit must be obtained before pollutants may be discharged into the navigable waters of the United States. The Act itself and an unbroken line of precedent in this Court clearly recognize that federal courts are not authorized to employ equitable discretion to allow a continuing violation of such a statutory requirement.

ARGUMENT

I. WHERE A FEDERAL STATUTE IS BEING VIOLATED THE EQUITABLE DISCRETION OF A COURT IS TO BE USED TO ENSURE FULL COMPLIANCE.[55]

A. A Court Does Not Have Equitable Discretion to Permit a Continuing Violation of a Federal Statute.

1. *The Standard Derived from Litigation Between Private Parties Does Not Apply to the Issuance of Injunctive Relief for Violations of Federal Statutes.*

The injunction, once an "extraordinary" remedy administered by subordinate chancery courts,[56] is today a common tool to ensure compliance with civil statutes. Historically, equity operated as a highly discretionary

---

[54] Navy Pet. 49a.

[55] Counsel for Puerto Rico are indebted to Zygmunt J.B. Plater, Visiting Professor of Law at Boston College Law School, for allowing them to review the manuscript of his forthcoming article entitled "Statutory Violations and Equitable Discretion," to be published next year. Some of the analysis contained in this brief was inspired by this manuscript.

[56] *Cf.* Petroleum Exploration, Inc. v. Public Service Comm'n of Kentucky, 304 U.S. 209, 218 (1938). *See also Developments in the Law—Injunctions*, 78 Harv. L. Rev. 994, 997 (1965); J. Story, *Equity Jurisprudence* § 33 (1st ed. 1836).

"gloss" on the common law to be invoked when traditional legal remedies and procedures did not afford the complainant adequate relief.[57] Because of its discretionary nature, equity jurisprudence developed an extraordinary array of limitations and exceptions designed to prevent the Chancellor from expanding his remedial jurisdiction into realms properly reserved for courts of law.[58]

The twentieth-century injunction is a remedy of a different sort. The merger of law and equity has removed the traditional tension between the different forms of judicial relief. Today, many of the historical limitations on the injunctive remedy "have become equitable fictions."[59] The modern statutory injunction bears little resemblance to its common-law ancester, and many of the maxims and aphorisms that were invoked to limit the grant of injunctive relief in the era of the Chancellor have lost their meanings in the modern context.

In private litigation, courts have traditionally engaged in a "balancing" analysis to determine whether the hardship suffered by the plaintiff in the absence of equitable relief exceeds the potential harm to the defendant in the event that an injunction is granted. A court may exercise broad discretion in striking that balance, including the discretion to refrain from issuing an injunction.[60]

This discretion is limited, however, when the plaintiff alleges and proves that the defendant is engaged in a continuing violation of a federal statute. This Court has long heeded Justice Frankfurter's familiar admonition that actions to enjoin continuing violations of federal law should be adjudged in accordance with a different and more limited standard of discretion:

---

[57] F. Maitland, *Equity* 18 (2d rev. ed. 1936).

[58] *See generally* O. Fiss, *Injunctions* 2-13 (1972).

[59] *Developments in the Law—Injunctions*, 78 Harv. L. Rev. 994, 996 (1965).

[60] *See, e.g.*, Leonardo v. Leonardo, 145 F. 2d 849, 851 (D.C. Cir. 1944).

> "Balancing the equities" when considering whether an injunction should issue, is lawyers' jargon for choosing between conflicting public interests. When Congress itself has struck the balance, has defined the weight to be given the competing interests, a court of equity is not justified in ignoring that pronouncement under the guise of exercising equitable discretion.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 609-10 (1952) (Frankfurter, J., concurring).

2. *A Consistent Line of Supreme Court Decisions Precludes the Exercise of Equitable Discretion to Permit a Continuing Violation of a Federal Statute.*

Without any analysis of the line of cases decided by this Court and the rulings of the lower courts, the Navy attempts to manufacture some inconsistency in the applicable law. The essential argument raised by the Navy in this case is that "[t]he court of appeals should have looked to *Hecht Co. v. Bowles*, rather than *TVA v. Hill*, for the analysis that controls this case." [61] This argument incorrectly implies that this Court's decisions in those two cases cannot be harmonized. As discussed below, the cases are consistent with each other and with an unbroken line of other Supreme Court cases, all of which support Puerto Rico's position here.

One of the early cases to discuss the standards that govern the issuance of injunctive relief to remedy the violation of a federal statute is *United States v. City and County of San Francisco*, 310 U.S. 16 (1940). In that case, the government sought to enforce a federal statute prohibiting municipalities from reselling water rights obtained by federal grant. San Francisco acknowledged that it had resold water rights to a private utility company, but claimed that an injunction should not enter be-

---

[61] Navy Br. 9 (citations omitted).

cause the balancing of equities did not favor injunctive relief. Rejecting the city's claim, this Court held that the case "does not call for a balancing of equities or for the invocation of the generalities of judicial maxims. . . . Congress provided that the [defendant] shall at all times comply with and observe . . . the conditions specified in this Act." 310 U.S. at 30. Injunctive relief was required to halt continuing violation of the Act:

> The equitable doctrines relied on do not militate against the capacity of a court of equity as a proper forum in which to make a declared policy of Congress effective. Injunction to prohibit continued [statutory violations] is both appropriate *and necessary.*

301 U.S. at 31 (emphasis added).

Thereafter, in *Hecht Co. v. Bowles*, 321 U.S. 321 (1944), the Court once again rejected unfettered "balancing" as the analytical standard for assessing whether a violation of a federal statute should be allowed to continue. The statute at issue in *Hecht* was the Emergency Price Control Act of 1942,[62] a wartime measure granting broad powers to the Office of Price Administration to fix maximum prices for commodities and services. The Hecht Company, operator of a large department store in Washington, D.C., unwittingly sold consumer goods between May and October, 1942, at prices in excess of the OPA maxima. Hecht argued that violations were inevitable when a new and highly complex scheme of price regulation was applied to a retail establishment the size of a department store. It asserted that steps had been taken to prevent further overcharges in the future. These representations satisfied the trial court that violations were not likely to continue and that issuance of an injunction would serve no purpose.

This Court agreed, and did so in a manner that deliberately and clearly acknowledged the existence of limitations on judicial discretion where federal statutes were

---

[62] 56 Stat. 23, 50 U.S.C.A. App. § 901 *et seq.* (1951).

violated. The "traditional practices" of equity courts, wrote Justice Douglas, must be "conditioned by the necessities of the public interest which Congress has sought to protect" by enacting the Price Control Act. 321 U.S. at 330. This necessarily limits the exercise of discretion by federal courts:

> [T]heir discretion under [the Act] must be exercised in light of the large objectives of the Act. For the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in these cases. That discretion should reflect an acute awareness of the Congressional [policy].

Id. at 331 (emphasis added).

The Court refined this doctrine in two notable cases decided in the 1950's, each involving the authority of the Executive Branch to prevent crippling steel strikes. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Court reviewed President Truman's order requiring the seizure of all steel mills in the United States to assure continued production of steel for the Korean War effort. The seizure order exceeded the statutory and constitutional authority of the Executive Branch. The government argued, nevertheless, that in balancing the transgression of the President against the compelling military necessities of the Korean War, the President should not be enjoined. The Court flatly rejected the government's argument. "When Congress itself has struck the balance," wrote Justice Frankfurter in his concurring opinion, "a court of equity is not justified in ignoring that pronouncement under the guise of exercising equitable discretion." 343 U.S. at 610.

Justice Frankfurter revisited the same issue seven years later in a lengthy concurring opinion accompanying the Court's *per curiam* judgment in *United Steelworkers of America v. United States*, 361 U.S. 39, 44-62 (1959). The case grew out of President Eisenhower's successful effort to obtain an 80-day back-to-work order from a dis-

trict court ending an industry-wide strike in the basic steel industry. The Steelworkers raised many equitable arguments in defense of their position that the strike should not be enjoined. The issue before the Court, wrote Justice Frankfurter, was "whether the District Court was to exercise the conventional discretionary function of equity in balancing conveniences as a preliminary to issuing an injunction." 361 U.S. at 55. His answer was succinct:

> We conclude that under the national emergency provisions of the Labor Management Relations Act it is not for judges to exercise conventional discretion to withhold an eighty-day injunction upon a balancing of conveniences.
>
> "Discretionary" jurisdiction is exercised when a given injunctive remedy is not commanded as a matter of policy by Congress, but is, as a presupposition of judge-made law, left to judicial discretion. Such is not the case under this statute. The purpose of Congress expressed by the scheme of this statute precludes ordinary equitable discretion.

Id. at 56.

In *Albemarle Paper Company v. Moody*, 422 U.S. 405 (1975), the trial court refused to order back pay for minority employees who were systematically assigned to low-paying jobs in violation of Title VII of the 1964 Civil Rights Act. Noting that back pay was an equitable remedy, the trial court ruled that the equities favored the employer because there was no evidence of bad faith on the employer's part and the plaintiffs had waited an unreasonably long time before asserting their back pay claim. On appeal, this Court held that the trial court had abused its discretion by declining to award back pay for those reasons. "It is true," wrote Justice Stewart for the Court, "that 'equity eschews mechanical rules . . . [and] depends on flexibility.'" 422 U.S. at 417, quoting *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946). He continued:

> But when Congress invokes the Chancellor's conscience to further transcendent legislative purposes, what is required is the principled application of standards consistent with those purposes and not "equity [which] varies like the Chancellor's foot."

Id., quoting *Gee v. Pritchard*, 2 Swanston 403, 414, 36 Eng. Rep. 670, 674 (1818).

This Court's decision in *Rondeau v. Mosinee Paper Corporation*, 422 U.S. 49 (1975), also illustrates the narrow range of equitable discretion that may be exercised by courts when there is a continuing violation of a federal statute. In *Rondeau*, an investor committed technical violations of the securities laws by making large purchases of the plaintiff company's common stock without complying with statutory disclosure requirements under the Williams Act.[63] The violations were promptly corrected after they were discovered, and the defendant soon thereafter stopped purchasing the company's stock and discontinued his plan to acquire a controlling interest in the company. This Court, speaking through Chief Justice Burger, agreed with the trial judge that under these facts an injunction was unnecessary: "[T]he usual basis for injunctive relief, 'that there exists some cognizable danger of recurrent violation,' is not present here." 422 U.S. at 59, *quoting from United States v. W. T. Grant Company*, 345 U.S. 629, 633 (1953). As in *Hecht*, the issuance of an injunction was not necessary to prevent a future violation of the Act.

This Court's most recent pronouncement on the subject, *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), is fully consistent with previous rulings concerning the relief that should be issued to remedy violations of federal statutes. The issue, once again, was whether a trial court should have halted a continuing violation of federal law (in that case, the Endangered Species Act of 1973), notwithstanding the fact that an injunction would

---

[63] 15 U.S.C. §§ 78m(d), 78n(d), (e), (f) (1976 & Supp. IV 1980).

prevent the operation of a nearly completed federal dam and conflicted with several countervailing equitable considerations. After determining that the agency's action would violate the statutory requirement, this Court ruled that the violation must be prevented and the district court should have issued the requested injunction.

Hecht was cited in *TVA v. Hill* for the proposition that a trial court is not "mechanically obligated to grant an injunction for every violation of law." 437 U.S. at 193. But the Court recognized that the narrow holding in *Hecht* could not be used to permit a continuing violation of a statute.[64] Thus, after citing *Hecht*, this Court stated:

---

[64] That voluntary compliance with a federal statute can obviate the need for a statutory injunction in the *Hecht* situation was a focus of discussion during oral argument in the *TVA v. Hill* case on April 18, 1978. The Court engaged in this colloquy with counsel for the respondents:

> QUESTION: . . . Do you suggest that any of the legislation passed here has abrogated the normal equity function of a United States District Judge in granting an injunction, the very extraordinary relief that is sought here—
>
> MR. PLATER: Not at all, Your Honor.
>
> QUESTION: —that—are you suggesting that he should not function as he does with any other application for an injunction?
>
> MR. PLATER: Your Honor, that question is an important one. We do not advocate the stripping of this Court or any court of the equitable powers. And indeed, Your Honor, we rely on Your Honor's decision in *Rondeau v. Moisinee Paper Corporation*, and that is to say, the equity courts have the full panoply of powers required to enforce the laws of Congress.
>
> QUESTION: But *Hecht against Bowles* says you don't get an injunction automatically for a statutory violation.
>
> MR. PLATER: That's correct, Your Honor. And we do not insist on an injunction. If petitioner agrees to obey the law voluntarily, as the Hecht Corporation did in that case, or as the Moisinee Paper Corporation agreed [sic] in Your Honor's case—
>
> QUESTION: Then you don't need an injunction?

> Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought . . . . We have no . . . mandate from the people to strike a balance of equities . . . [when] Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck . . . .
>
> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.

437 U.S. at 194-95.[65]

The decisions of this Court establish three principles of law that control the disposition of this case. First, the court must look to the statute, rather than the competing interests of the parties, and must provide a remedy that vindicates the requirements and objectives of the statute in question. Second, federal courts are not stripped of *all* discretionary authority to fashion relief. A court, for example, still has the sort of discretion exercised in *Hecht* and *Rondeau* to assess the *likelihood of a continuing violation* in order to determine whether injunctive relief is

---

MR. PLATER: That's precisely right.

QUESTION: It's academic.

MR. PLATER: And the law would be complied with.

Transcript of Proceedings 51-52.

[65] In footnote 34 of its opinion in TVA v. Hill, 437 U.S. at 188, this Court distinguished as "completely inapposite" the cases decided under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* (1976) ("NEPA"), in which courts have refused to enjoin ongoing projects for failure to prepare an adequate environmental impact statement. Ironically, the trial court in the case at bar relied heavily on the inapposite NEPA cases for its denial of injunctive relief. Navy Pet. 161a.

necessary to halt a violation. Third, in none of these cases does this Court hold that a court has the equitable discretion to permit an ongoing violation of a federal statute. To the contrary, each case recognizes that injunctive relief is necessary to halt an ongoing violation of a federal statute when enforcement is sought.

These standards have been applied by the lower federal courts to enjoin a wide range of statutory violations. For example, in *Commodity Futures Trading Commission v. Hunt*, 591 F. 2d 1211 (7th Cir.), *cert. denied*, 442 U.S. 921 (1979), the trial court found that the Hunt family violated Section 6c of the Commodity Exchange Act [66] and implementing regulations but nevertheless refused to order any injunctive relief. The court of appeals concluded that the trial court had abused its discretion: "Actions for statutory injunctions need not meet the requirements for an injunction imposed by traditional equity jurisprudence. Once a violation is demonstrated, the moving party need show only that there is some reasonable likelihood of future violations." 591 F.2d at 1220.[67]

In *Wilderness Society v. Morton*, 479 F. 2d 842 (D.C. Cir.) (en banc), *cert. denied*, 411 U.S. 917 (1973), the issue was whether construction of the Alaska Pipeline could proceed in the absence of legally valid construction permits. The Interior Department had failed to observe a provision in the Mineral Leasing Act of 1920 limiting the permissible width of rights-of-way across federal lands. The trial court refused to enter an injunction, citing the importance of the nearly-completed pipeline to the economy of Alaska and the well-being of its citizens. The

---

[66] 7 U.S.C. § 13a-1 (1976).

[67] In determining the likelihood of future violations, the court must examine several factors. Past conduct may be highly suggestive of the prospect of continuing violations, particularly "when a defendant persists in its illegal activities 'right up to the day of the hearing in the district court . . . .'" 591 F.2d at 1220, quoting from Commodity Futures Trading Comm'n v. British American Commodity Options Corp., 560 F. 2d 135, 142 (2d Cir. 1977).

court of appeals agreed that further delay would exact a heavy social and economic cost. But following the principles established by this Court, the court then stated:

> Recognizing these hardships, however, we nevertheless are constrained to enjoin the Secretary of the Interior from issuing one of the permits which all parties recognize is necessary for construction of the pipeline . . . . *We must enjoin* issuance of this special land use permit until Congress changes the applicable law . . . .

479 F. 2d at 847-48 (emphasis added).[68]

A recent court decision had no difficulty in harmonizing the holding in *Hecht* with the analysis of this Court in *TVA v. Hill*. Only two months before the Navy filed its petition for a writ of certiorari in this case, the federal government successfully defended before the Sixth Circuit the issuance of an injunction without an evidentiary hearing on the "equities" to enforce new source performance standards under the Clean Air Act. *United States v. City of Painesville, Ohio*, 644 F. 2d 1186, 1193-94 (6th Cir. 1981).[69]

---

[68] Congress subsequently amended the Mineral Leasing Act specifically to permit completion of the Alaska Pipeline. Pub. L. No. 93-153, 87 Stat. 576 (1973); *see* Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 244 n. 11 and accompanying text (1975). *See also* Lathan v. Volpe, 455 F. 2d 1111 (9th Cir. 1971); Arlington Coalition on Transportation v. Volpe, 458 F. 2d 1323 (4th Cir.), *cert. denied sub nom.* Fugate v. Arlington Coalition on Transportation, 409 U.S. 1000 (1972); SEC v. Advance Growth Capital Corp., 470 F. 2d 40, 53 (7th Cir. 1972); West Virginia Division of Izaac Walton League v. Butz, 522 F. 2d 945, 955 (4th Cir. 1975); Studebaker Corp. v. Gittlin, 360 F. 2d 692, 698 (2d Cir. 1966); Henderson v. Burd, 133 F. 2d 515, 517 (2d Cir. 1943).

[69] The court's lucid discussion of *Hecht* and *TVA v. Hill* is reproduced at pages 13-14 of Puerto Rico's Brief in Opposition to the Navy's Petition for a Writ of Certiorari.

B. The Court Below Correctly Ruled that the Trial Court Erred by Refusing to Enjoin the Navy's Ongoing Violation of the FWPCA.

At trial, Puerto Rico proved that the Navy has violated and continues to violate the FWPCA by discharging bombs, shells and other munitions in coastal waters without first obtaining an NPDES permit. The Navy conceeds that it has violated the Act. The evidence showed that the Navy persisted in its violations "right up to the day of the hearing," *Commodity Futures Trading Commission v. British American Commodity Options Corporation*, 560 F. 2d 135, 142 (2d Cir. 1977), and beyond. It will continue to violate the Act until it either obtains an NPDES permit or a Presidential exemption from the permit requirement.

In its review of the trial court decision, the Court of Appeals correctly observed that the trial court had not applied the statutory analysis required by the cases involving violations of federal statutes. The Court of Appeals reviewed the applicable statutory and common law requirements. The court noted that the Act imposed "an absolute statutory obligation to stop any discharges of pollutants until the permit procedure has been followed." [70] The court critized the trial court for failing to protect the integrity of the permit process by allowing the statutory violation to continue. Finally, the court observed that the Act expressly provided for a Presidential exemption if the prohibition against the continued violation would affect military preparedness. The court's analysis of these considerations squarely tracked the inquiries required by *City and County of San Francisco*, *Hecht*, *Rondeau*, and *TVA v. Hill*. In light of this precedent, the Court of Appeals properly ordered a halt to the violation of the Act.

---

[70] Navy Pet. 48a.

II. INJUNCTIVE RELIEF IS REQUIRED IN THIS CASE TO ENFORCE THE REQUIREMENTS OF THE FEDERAL WATER POLLUTION CONTROL ACT.

A. Introduction

This Court's decision in *TVA v. Hill* provides an object lesson in the relationship between Congress and the judiciary in applying and enforcing federal law. It is Congress' task, observed the Chief Justice, to "formulate legislative policies and mandate programs and projects." Courts cannot, under the guise of equitable discretion, frustrate Congressional prohibitions by refusing to "enforce them where enforcement is sought." 437 U.S. at 194. Courts abuse their discretion when they substitute their own notions of equity for those expressed by Congress:

> We have no . . . mandate from the people to strike a balance of equities . . . [when] Congress has spoken in the plainest of words, making it abundantly clear that the balance has [already] been struck.

Id.

By enacting the FWPCA, Congress again has spoken in the plainest of words. The Act embodies a vigorously stated, clearly expressed policy to ban the discharge of pollutants except in conformity with a permit system that requires all dischargers to have a permit issued pursuant to a permit process. It specifies the manner in which federal facilities should be treated and how national security interests should be handled. It is not the province of a court to frustrate "a particular course consciously selected by the Congress" (437 U.S. at 194) by deciding that statutory violations should be allowed to continue.

The Navy seeks to read equitable flexibility into the FWPCA by using a canon of statutory construction purportedly divined from *TVA v. Hill*. According to the Navy, that case stands for the principle that a court has discretion to permit an ongoing violation of an explicit prohibition unless the statute *in addition* contains a " 'clear ordering of priorities' which the courts are powerless

to alter." [71] According to the Navy, this discretion is removed only if the text and legislative history of a federal statute evince some clear congressional intent "to eliminate the traditional discretion of the courts in enforcing the statutory requirements." [72]

These rules of construction cannot be distilled from *TVA v. Hill* [73] and are directly contrary to this Court's recent interpretations of the FWPCA in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, —— U.S. ——, 49 U.S.L.W. 4783 (1981), and *E.I. Dupont de Nemours & Company v. Train*, 430 U.S. 112 (1977). There is no presumption that courts possess equitable discretion to fashion new remedies for violations of federal statutes. In *Sea Clammers*, this Court stated that "[i]n the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." 49 U.S.L.W. at 4787. Similarly, in *E.I. Dupont*, the Court overturned a holding that "provisions for variances, modification and exceptions [to the provisions of the FWPCA] are appropriate to the regulatory process." 430 U.S. at 138 (citing 541 F. 2d 1028). This Court explained that it lacked the discretion to read flexibility into the Act when none was intended by Con-

---

[71] Navy Br. 14.

[72] *Id.* 15.

[73] The Navy attaches talismanic significance to this Court's use of the phrase "ordering of priorities" in *TVA v. Hill* to describe the situation in which Congress in unequivocal terms has mandated strict compliance with a federal statute. *See* Navy Br. 16-17. However, the Navy apparently interprets this phrase to refer to situations in which Congress has expressly addressed and ranked various other national interests relative to the interests reflected in a particular federal statute. Congress realistically cannot be expected to reassess and rank national priorities each time a bill is passed into law. At least in cases where, as here, there is no conflict with any other requirement of federal law, an express statutory prohibition is a Congressional priority that must be enforced by the courts. This Court did not intend otherwise by using the phrase "ordering of priorities" in *TVA v. Hill*.

gress: "The question, however, is not what a court thinks is generally appropriate to the regulatory process, it is what Congress intended . . . . It is clear that Congress intended these regulations [new source performance standards under Section 306] to be an absolute prohibition." *Id. See Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979) ("[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it").

B. The Permit Requirement Reflects Congress' Express Intention to Prohibit Point-Source Discharges Made Without a Permit.

The 1972 Amendments to the FWPCA [74] were enacted almost a decade ago because Congress found the federal water pollution control effort prior to 1972 "inadequate in every vital aspect." [75] Congress intended to correct the past failings of water pollution control enforcement efforts under the Rivers and Harbors Appropriations Act of 1899 [76] and the Water Quality Act of 1965.[77] As explained by this Court, the 1972 Amendments "were viewed by Congress as a 'total restructuring' and 'complete rewriting' " of existing water pollution legislation. *City of Milwaukee v. Illinois*, —— U.S. ——, 49 U.S.L.W. 4445, 4449 (1981), *quoting from 1 A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong., 1st Sess. 350-51, 359-60 (1973).[78]

---

[74] Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972) (cited hereinafter as the "1972 Amendments").

[75] S. Rep. No. 92-414, 92d Cong., 1st Sess. 7 (1971) (cited hereinafter as "Senate Report").

[76] 33 U.S.C. § 401 *et seq.* (1976) (cited hereinafter as the "Refuse Act").

[77] Pub. L. No. 89-234, 79 Stat. 903 (1965), *formerly codified at* 33 U.S.C. § 1151 *et seq. and superseded by* the 1972 Amendments, *supra* n. 74.

[78] This multi-volume compendium of the legislative history of the 1972 Amendments is cited hereinafter as "Legis. His."

Under the Refuse Act, authority to control water pollution was principally confined to industrial polluters. The Refuse Act contained no standards for the discharge of pollutants; it amounted to little more than a declaration that the discharge of refuse was unlawful.[79] The Act contained no effective enforcement mechanism, no program to process and evaluate permit applications and no investigative agency to monitor compliance. This, combined with the limited scope of the Act, made it wholly ineffective as a mechanism for controlling water pollution.[80]

---

[79] 118 Cong. Rec. 10780 (1972) (statement of U.S. Attorney, S.D.N.Y., inserted by Rep. Dingell), *reprinted in* 1 Legis. His. 689.

[80] Senate Report 5; 117 Cong. Rec. 38833 (1971), *reprinted in* 2 Legis. His. 1334. The Navy is correct in its observation that Congress in writing the enforcement provisions of the FWPCA drew upon the enforcement provision of the Rivers and Harbors Act. *See* Navy Br. 16. However, the Navy is flatly wrong when it asserts that "there is no indication that at the time Congress acted [to pass the FWPCA] it anticipated any different result" from the ability of courts to fashion "appropriate relief to vindicate the purposes of the statute [the Refuse Act] with due regard to the surrounding facts and circumstances." *Id.* As described herein, there is *every* indication that Congress in unequivocal terms did intend a different result. Congress specifically sought to correct the laxity and flexibility contained in the enforcement provisions. The Refuse Act enforcement procedures were a model that was *not* to be followed.

Even if the enforcement provisions of the Refuse Act did not conflict with the related provisions of the FWPCA, none of the cases cited by the Navy supports the cited proposition that under the Refuse Act "[i]njunctions requiring immediate cessation of discharges in violation of the Act have not been automatic." Navy Br. 16. The relief issued in Reserve Mining Co. v. EPA, 514 F. 2d 492 (8th Cir. 1975), was based upon a violation of the Water Quality Act of 1965 rather than the Refuse Act. The Water Quality Act expressly states that the district court should give "due consideration to the practicability and to the physical and economic feasibility of securing abatement of any pollution proved" and may enter orders "as the public interest and the equities of the case may require." Water Quality Act of 1965, *supra* n. 77 at § 5(a) (adding § 10(c)(5) to the FWPCA, 33 U.S.C. § 466). In any event, the court

The Water Quality Act of 1965 proved to be just as ineffective. The Act placed upon states the paramount responsibility for the establishment and enforcement of water quality standards. States were required to adopt water quality standards and obtain the approval of the Secretary of the Interior. Enforcement procedures were extremely cumbersome.[81] A lawsuit could be commenced only if (1) a formal notice of intent to sue preceded the action by at least 180 days, (2) the governor of the state involved consented to the suit, and (3) the pollution had an interstate impact. The Act gave courts broad discretion to enter remedial orders as "the public interest and equities in the cause may require." [82] Congress, in

---

did not even consider whether either the Refuse Act or the Water Quality Act conferred equitable discretion to permit an onging violation of the statute. In United States v. Kennebec Log Driving Co., 491 F. 2d 562 (1st Cir. 1973), *on remand*, 399 F. Supp. 754 (D. Me 1975), *aff'd*, 530 F. 2d 446 (1st Cir. 1976), *cert. denied*, 429 U.S. 821 (1977), the court found that there was no Refuse Act violation because of a statutory exemption for logdriving activities. The court remanded for district court adjudication of whether the incidental deposit of log chips was also exempt. The decision in United States v. Rohm & Haas Co., 500 F. 2d 167 (5th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975), is similarly inapposite. In that case, the court was required to determine the amount of chemical discharge that would be permissible in the absence of a Refuse Act permit. The government apparently did not request a total prohibition against discharges, so there was no question of whether the court should order a halt to discharges. In neither *Kennebec Log* nor *Rohm & Haas* did the court consider whether it possessed equitable discretion under the Refuse Act to permit a continuing violation.

[81] The Senate Report explained:

> The Committee, of course, has in the record documentation of the poor enforcement performance under the 1965 Act. The Committee concluded that not only were there weaknesses in the procedures established on enforcement, but more importantly, there were weaknesses in the overall design of enforceable requirements.

Senate Report 63.

[82] Water Quality Act of 1965, *supra* n. 77 at § 5(a) (adding § 10(c)(5) to the FWPCA).

short, expressly directed the courts to balance the equities before issuing injunctive relief—an approach that was purposefully jettisoned when the existing water pollution statutes were comprehensively revised in 1972.

The 1972 Amendments reflected a profound shift in Congressional philosophy toward the prevention and control of water pollution. The 1972 Amendments created a new system of regulation based on the application of effluent limitation standards to individual polluters through the establishment of a "National Pollutant Discharge Elimination System" ("NPDES") and the issuance of NPDES permits to would-be polluters. The NPDES permit system became the basic mechanism for enforcing effluent and water quality standards and compliance deadlines for the abatement of water pollution. It was described by its draftsmen as "the most important facet of the new water pollution control program." [83]

Section 301 of the FWPCA expressly provides that it is unlawful for a "point source" to discharge pollutants without the NPDES permit required by Section 402 of the Act.[84] Consistent with this statutory language, this Court has stated that "[*e*]*very* point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals." *City of Milwaukee v. Illinois*, —— U.S. ——, 49 U.S.L.W. 4445, 4449 (1981) (emphasis in original; footnote omitted).

The NPDES permit functions as a condition precedent to the discharge of pollutants. The Senate Report accompanying the 1972 Amendments reflected the change in federal policy: "Unlike its predecessor program which permitted the discharge of certain amounts of pollutants . . ., this legislation would clearly establish that no one has the right to pollute." The Report explains that "the Committee recognizes the impracticality of any effort to halt all pollution immediately. Therefore, this section

---

[83] H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 125 (1972).

[84] §§ 301, 402, 33 U.S.C. §§ 1311, 1342 (1976 & Supp. III 1979).

[Section 301] provides an exception *if* the discharge meets the requirements of this section, Section 402, and others listed in the bill." [85] Only if a permit is obtained is the discharge of pollutants allowed.

The permit requirement in Section 301(a) is the "enforcement hub" of the Act, at the center of a "web of complex interrelated regulatory programs." *United States v. Holland*, 373 F. Supp. 665, 668 (M.D. Fla. 1974). *See also United States v. Earth Sciences, Inc.*, 599 F. 2d 368 (10th Cir. 1979). The permit is the direct link between the EPA and each discharger. It assures that individual point sources are directly brought into compliance with the Act.[86] It also assures that the EPA, the agency with paramount expertise in the prevention of environmental degradation, has the opportunity to review proposed discharges before they are allowed to foul the nation's navigable waters.[87]

The courts have consistently held that Congress intended the permit to be the only means by which a discharger could escape the total prohibition of Section 301. In three recent decisions under the FWPCA, this Court has indicated that the NPDES permit is a precondition to the discharge of a pollutant. *City of Milwaukee v. Illinois*, —— U.S. ——, 49 U.S.L.W. 4445, 4447 (1981) (the FWPCA "established a new system of regulation under which it is illegal for anyone to discharge pollutants into the Nation's waters except pursuant to a permit"); *Train v. Colorado Public Interst Research Group, Inc.*, 426 U.S. 1, 7 (1976); *EPA v. State Water Resources Control Board*, 426 U.S. 200, 205 (1976).[88] In short, the

[85] Senate Report 42, 43 (emphasis added).

[86] *See* Senate Report 72.

[87] *See e.g.*, 117 Cong. Rec. 38805 (1971) (remarks of Sen. Randolph), *reprinted in* 2 Legis. His. 1272.

[88] *See also* Natural Resources Defense Council, Inc. v. Costle, 568 F. 2d 1369, 1374 (D.C. Cir. 1977); Bethlehem Steel Corp. v. Train, 544 F. 2d 657, 659 (3d Cir. 1976), *cert. denied*, 430 U.S. 975 (1977). In Save Our Sound Fisheries Ass'n v. Callaway, 387 F. Supp. 292 (D.R.I. 1974), the court enjoined the Army from disposing of

text, legislative history, and applicable case law flatly forbid the discharge of pollutants without an NPDES permit.

C. The Mandatory Administrative Review and Compliance Schemes Specified in the FWPCA Preclude Equitable Discretion to Allow an Ongoing Violation of the Permit Requirement.

The mandatory administrative review and compliance schemes established in the FWPCA do not permit courts to exercise equitable discretion to permit an ongoing violation of the permit requirement. If such discretion were allowed, the EPA's administrative review of permit applications would be undermined.[89] A discharger could

---

dredged materials in violation of several laws, including the FWPCA. The court there stated:

> The statutory procedures for obtaining a permit . . . before potentially harmful substances are introduced into the water are designed to insure that such decisions are based on specific and informed findings regarding the effect of such dumping on the marine environment.

387 F. Supp. at 299-300. And in Cooper v. Wisdom, 440 F. Supp. 1027 (S.D. Fla. 1977), the court restrained the Army from dredging marine areas under the authority of an invalid NPDES permit. The court stated that because the operation was being carried on without a valid permit, it "has therefore not been evaluated according to established criteria." The court concluded that "the plaintiff's right to protective relief from the effects of an invalid permit is clear." 440 F. Supp. at 1030.

[89] Congress specifically intended that the expertise of the EPA and state administrative agencies would be utilized to analyze the environmental consequences of proposed discharges. As this Court explained in City of Milwaukee v. Illinois, —— U.S. ——, 49 U.S.L.W. 4445, 4451 (1981):

> Not only are the technical problems difficult—doubtless the reason Congress vested authority to administer the Act in administrative agencies possessing the necessary expertise—but the general area is particularly unsuited to the approach inevitable under a regime of federal common law. . . . The statutory scheme established by Congress provides a forum for the pursuit of such claims before expert agencies by means of the

pollute unabated until the EPA could deny its permit application and order the discharges to stop. More importantly, as the Navy did in this case, dischargers may be tempted simply to wait until they are sued before filing permit applications; and even then they may try to escape the Act's prohibition against discharges without a permit by arguing, as the Navy did, that the equities should contravene Congress' intent in designing the permit system "to regulate *to the fullest extent possible* those sources emitting pollution . . ." *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979).

In an analogous situation, this Court has held that the statutory deadlines for compliance with the system of pollution abatement are mandatory. *EPA v. National Crushed Stone Association*, 449 U.S. 64 (1980). Considerations of cost and hardship do not excuse noncompliance with these deadlines. Contrary to the assertion of the Navy,[90] the phased system for compliance with technology-based effluent limitations does not evidence any relaxation of the threshold requirement that no discharges should be allowed unless the discharger has obtained a permit. If these deadlines are to be met, then all of the intermediate compliance deadlines must also be observed. There is no intermediate deadline for compliance with water quality standards. The NPDES permit is the initial requirement that must be satisfied to ensure compliance with the effluent limitations and the water quality standards. Each permit must, on a microcosmic level, include terms and conditions that will assure the attainment, on the macrocosmic level, of regional and national enforcement goals. The permit is the enforcement predicate; if permit procedures are not strictly observed, national enforcement goals are jeopardized.[91]

---

permit granting process. It would be quite inconsistent with this scheme if the federal courts were in effect to "write their own ticket" under the guise of federal common law . . .

[90] Navy Br. 19.

[91] The Act confers discretion upon the Administrator of EPA to require compliance on an earlier date. *See* 118 Cong. Rec. 33693

The opportunity for public participation in the permit process also evinces Congressional intent not to relieve a discharger from mandatory compliance with the permit process.[92] Congress did not intend that citizens would be required to assume onerous burdens of proof or engage in protracted litigation to compel violators to comply with the Act.[93] "One purpose of these new requirements is to avoid the necessity of lengthy fact finding, investigations, and negotiations at the time of enforcement. Enforcement of violations . . . should be based on relatively nar-

---

(1972), *reprinted in* 1 Legis. His. 163 (Senator Muskie) ("The Administrator retains the authority to require the application of these controls at an earlier date and it is intended that he will require their application the soonest practicable time."). However, the Act confers no discretion to issue permits that allow compliance after the deadline.

[92] Senate Report 64, 80. Without any reference to the legislative history or objectives of the Act, the Navy asserts that the Act's provision for citizen participation in the formation of remedial orders would "be pointless if every violation of the Act were to be remedied by an immediate cessation order." Navy Brief at 17 n. 17. This assertion is irrelevant. Puerto Rico has never argued, and the Court below did not rule, that every violation would have to be remedied by an immediate cessation order. Puerto Rico, for example, recognizes that a violation that would not recur would not have to be remedied by a cessation order. More importantly, citizens can play a vital role in the enforcement process even though courts do not have the equitable discretion to permit an ongoing violation of the Act. Citizens can present evidence concerning the likelihood of future violations so that a court can determine if injunctive relief is necessary to remedy a statutory violation. Citizens also may present evidence about the types of conduct that must be halted or the types of technology that can be employed by the discharger in order to comply with the Act.

[93] The legislative history demonstrates that Congress intended citizens to play an active role in ensuring prompt compliance. The Senate Report explained that "if governmental agencies fail to exercise their enforcement responsibility, the public is provided the right to seek vigorous action. . . . "[I]f the timetables established throughout the Act are to be met, the threat of sanctions must be real and enforcement provisions must be swift and direct." Senate Report 64, 65.

row fact situations requiring a minimum of discretionary decision making or delay. . . . [*T*]*he issue before the courts would be a factual one of whether there had been compliance.*" [94]

Consistent with these Congressional admonitions, citizens and states have the right to secure prompt compliance with the Act merely by proving that a polluter is discharging without a permit. They are not required to make the costly and time-consuming additional showing that a "balancing of the equities" warrants the issuance of injunctive relief to enforce compliance with the Act, or that there would be irreparable harm if the injunction were not issued. This type of proof would involve the lengthy fact finding and investigation that Congress sought to avoid. Yet that is the burden of proof the Navy seeks to impose on Puerto Rico, on other plaintiffs who seek to enforce the permit requirements of the Act and on the courts.[95]

---

[94] Senate Report 64, 80 (emphasis added).

[95] If the Navy's interpretation of the Act's enforcement provisions were adopted as the law, private citizens would be required to overcome potentially insurmountable obstacles and incur substantial costs to enforce the permit requirements of the Act. Consider the instant case as an example. Puerto Rico retained counsel and experts who traveled to the island of Vieques and then to the range in order to assemble information about the Navy's bombing and shelling activities on the marine environment. This information was obtained by snorkeling and scuba diving in the presence of live, unexploded ordnance in the waters. The trial court decided, however, that it should determine not only whether there were illegal discharges but also whether the damage to the marine environment was irreparable and whether this damage outweighed the Navy's asserted national security concerns. If other litigants are required to assume even a small fraction of the burdens assumed by Puerto Rico in order to enforce the Act, the citizens enforcement provisions will be severely weakened and Congress' hopes for avoiding "the necessity of lengthy fact finding" or "investigations" in the enforcement process will be unrealized. The judiciary moreover will be saddled with the onerous burden of evaluating and "balancing" complex evidence concerning such matters as the marine sciences and national security.

The Navy's attempt to read equitable discretion into the Act's permit requirement also overlooks the crucial role played by state governments in the permit process. Section 401 of the Act protects a state's right to impose more stringent requirements than those contained in the proposed permit.[96] A state has the express authority to deny certification of the permit application or attach conditions that must be included in the final permit.[97] If the state denies certification, the EPA may not issue the NPDES permit.

This provision gives each state paramount authority to protect its waters from environmental degradation. This authority would be undermined if a discharger were allowed to pollute while its permit application is under review by the state.

That is precisely the situation before this Court. Although the Navy has intimated that the issuance of a permit for the discharge of munitions into Vieques waters is a mere formality, the Environmental Quality Board of Puerto Rico on December 2, 1981, exercised its authority under Section 401 of the Act to deny certification of the draft NPDES permit prepared by the EPA to authorize these discharges. In its review of the permit application, Puerto Rico set forth the "substantial environmental consequences" that the court below recognized might lead the Administrator to deny the permit.[98] As a result of this decision, consistent with Section 402 of the Act, the EPA must deny the Navy's permit application.

The Navy asserts that equitable discretion to fashion relief is expressly authorized by Section 309(b) of the Act,[99] which gives the Administrator the authority to issue "appropriate relief, including a permanent or tem-

---

[96] 33 U.S.C. § 1341 (1976 & Supp. III 1979).

[97] *Id.*

[98] Navy Pet. 49a.

[99] 33 U.S.C. § 1319(b) (1976).

porary injunction." [100] This statutory quotation, however, must be read in the context of the Act's express prohibition against discharges of pollutants without a permit, the purpose of the permit review process, the requirement for swift private enforcement, and the state certification provision.

Even the literal terms of Section 309(b) do not authorize courts to exercise broad equitable discretion. The full text of this provision states that "[t]he Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, *for any violation for which he is authorized to issue a compliance order under subsection (a) of this section.*" (Emphasis added.) The referenced subsection (a), however, leaves no room for discretion to permit an ongoing violation of the Act. Section 309(a)(3) mandates that when the Administrator finds a violation of the permit requirement "he *shall* issue an order requiring such person to comply with such section. . . ." [101] Congress required the EPA to seek "immediate compliance".[102] "[T]o provide opportunity for further delay," observed the Senate Public Works Committee, "would only reward polluters who ignored the requirements of the 1965 Act and penalize those discharge sources who moved quickly to comply." [103]

---

[100] Navy Br. 15.

[101] 33 U.S.C. § 1319(a)(3) (1976 & Supp. III 1979) (emphasis added).

[102] Conference Rep., H.R. Rep. No. 92-1465, 92d Cong., 2d Sess. 131 (1972); *see also* H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 114 (1972) ("the Administrator . . . *shall* issue an order requiring compliance") (emphasis added).

[103] Senate Report 44. The Administrator's only discretion is to allow a 30-day grace period for the discharger to comply voluntarily with the Act. Section 309(a), 33 U.S.C. § 1319(a) (1976 & Supp. III 1979). The Administrator could extend the grace period beyond thirty days only for a discharger that, *inter alia*, had applied for a permit prior to December 31, 1974. Section 309(a)(5)(B), 33 U.S.C. § 1319(a)(5)(B) (1976 & Supp. III 1979). This limited grace period expired nearly seven years ago and is not relevant here.

Apart from an injunction, the only other relief authorized under Section 309(a) is the issuance of a civil penalty or a criminal penalty. These types of penalties would seem to be "appropriate" in two cases: (1) if violations have ceased and penalties would deter future violations, or (2) if a penalty that would deter future violations should be imposed in addition to an injunction.[104] In no section of the Act and in no portion of the legislative history is it stated that refusal to halt an ongoing violation of the Act would be "appropriate relief" or that the remedial provisions of the Act incorporate the common law "balancing of the equities" approach to injunctive relief.[105]

---

[104] In describing the relief available under Section 309(b) of the Act, the House Committee mentioned only injunctive relief and civil and criminal penalties. H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 161 (1972). *See also* Senate Report 10.

[105] The citations used by the Navy do not support the proposition that the use of the modifier "appropriate" in Section 309(b), 33 U.S.C. § 1319(b) (1976), authorizes courts to give "due regard to equitable principles." Navy Br. 17. The decisions in Hecht Co. v. Bowles, 321 U.S. 321 (1944), and United States ex rel. Greathouse v. Dern, 289 U.S. 352 (1933), do not involve the FWPCA. Professor Moore in his treatise does not discuss the FWPCA. He does state, however, that there is "little or no room for discretion" when a federal statute provides for injunctive relief (citing United States v. City and County of San Francisco, 310 U.S. 16 (1940), for that proposition). 7 *Moore's Federal Practice* ¶ 65.18[3], at 65-135 (3d ed. 1980). The two cited cases that do involve the FWPCA—Realty Income Trust v. Eckerd, 564 F. 2d 447 (D.C. Cir. 1977), and State of Alaska v. Andrus, 580 F. 2d 465 (D.C. Cir.), *vacated in part sub nom.* Western Oil & Gas Ass'n v. Alaska, 439 U.S. 922 (1978)—do not interpret Section 309 of the FWPCA. These cases do not discuss the radical departure of this section from the enforcement provision of the Water Quality Act of 1965, which expressly authorizes courts to consider equitable considerations in fashioning relief. The cases also do not address the legislative history of the FWPCA, which mandates that compliance must be swift and unencumbered by the sort of "lengthy fact finding, investigations and negotiations" that would be involved if courts were given equitable discretion to decline to enforce the prohibitions of the Act. Senate Report 65.

Unless Congress has expressly allowed for the exercise of judicial discretion to remedy statutory violations, courts cannot alter the remedial scheme of a federal statute, thereby substituting their own notions of the common weal for Congress' ordering of priorities. *Middlesex County Sewerage Authority v. National Sea Clammers Association*, —— U.S. ——, 49 U.S.L.W. 4783, 4787 (1981) ("In view of [the] elaborate enforcement provisions [in the FWPCA] it cannot be assumed that Congress intended to authorize by implication additional judicial remedies); *City of Milwaukee v. Illinois*, —— U.S. ——, 49 U.S.L.W. 4445 (1981). This guiding principle of statutory construction precludes a court from engrafting equitable discretion onto the clear, mandatory requirements contained in the Act.[106] In this case, the court below correctly applied this principle to enjoin the Navy from further violations of the Act.[107]

---

[106] In one critical respect, Puerto Rico's situation differs from the situations the Court addressed in *Sea Clammers* and *City of Milwaukee*. In those cases, the plaintiff sought to obtain additional, more stringent remedies than those expressly provided in the FWPCA, which the Court found occupied the field of federal water pollution control law. In this case, Puerto Rico only seeks enforcement of a remedy that is expressly provided for in the Act. The Navy, by contrast, seeks to weaken the commands and remedies provided in the Act by asking this Court to incorporate into the Act the traditional, flexible and discretionary common law standards that govern the issuance of injunctive relief in private litigation. In essence, Puerto Rico seeks to preserve the integrity of the Act's enforcement scheme while the Navy seeks to weaken it.

[107] The Navy incorrectly characterizes the trial court ruling as one which "brings the Navy into compliance" with the FWPCA. The Navy mistakenly assumes that compliance is accomplished merely by following the procedures that are necessary to obtain a permit. As previously described, the Act specifically forbids the discharge of pollutants *unless and until* the discharger obtains a permit or an exemption. Compliance with the Act by the Navy therefore cannot occur until it obtains a permit or an exemption. In the interim, the Navy is breaking the law.

D. The Legislative History of the FWPCA Manifests a Clear Congressional Intent that Federal Facilities Fully Comply with the Act.

1. *Federal Facilities are to Serve as a Model for Compliance with the Act.*

The ruling of the Court of Appeals properly vindicated Congress' desire to ensure full compliance with the FWPCA by federal facilities. Congress specifically required "[f]ederal facilities to meet the same effluent limitations and water quality standards as private sources of pollution." [108] Federal facilities were to assume the leading role in achieving compliance with the water pollution abatement scheme contained in the Act. The House Report explained that "[t]he Committee, after hearing of numerous examples of flagrant violation of pollution controls, is determined that the Federal facilities shall be a *model for the Nation.*" [109] Federal facilities do not comply with this mandate if they are allowed to violate the Act's permit requirements—the cornerstone for enforcement.

Congress recognized that there are certain limited situations in which these requirements would have to be tempered by countervailing national interests. For these limited situations, Congress drafted the Presidential exemption provisions.

---

[108] H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 73 (1972).

[109] H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 118 (1972) (emphasis added). The federal facilities provisions of the FWPCA were modeled on the virtually identical federal facilities provisions in the previously enacted Clean Air Act, 42 U.S.C. § 7401 *et seq.* (1976 & Supp. II 1978). The legislative history of the Clean Air Act provision also manifested Congressional concern for the "flagrant violations of air and water pollution standards by Federal facilities." S. Rep. No. 91-1196, 91st Cong., 2d Sess. 23 (1970). *See also* 116 Cong. Rec. 19205 (1970).

2. *The Presidential Exemption is the Mechanism that Must be Used by Federal Facilities to Authorize Discharges Without an NPDES Permit.*

The Presidential exemption—not the exercise of equitable discretion by courts—is the safety valve for essential federal activities that would otherwise be halted by the statutory permit requirement.[110] The exemption provisions manifest two important objectives that Congress sought to achieve by passage of the FWPCA. They evince Congress' determination that only paramount national interests are sufficiently compelling to justify noncompliance with the permit requirement.[111] They also express Congress' intent that the President—not the federal courts—

---

[110] FWPCA § 313, 33 U.S.C. § 1323 (1976 & Supp. III 1979).

[111] Congress also provided narrow, carefully crafted exemptions for industrial dischargers that could prove economic and technological justification for a variance from the deadlines for compliance with promulgated effluent limitation regulations. *See* FWPCA §§ 301(c), 301(g), 302(b)(2), 33 U.S.C. §§ 1311(c), 1311(g), 1312(b)(2) (1976). The existence of these exemptions, in conjunction with the federal facilities exemption, manifest Congress' intent to strictly limit the opportunities for noncompliance with the Act's mandatory restrictions on the discharge of pollutants. This Court's observations in TVA v. Hill, 437 U.S. 153, 188 (1978), forcefully reaffirm this analysis:

> In passing the Endangered Species Act of 1973, Congress was also aware of certain instances in which exceptions to the statute's broad sweep would be necessary. Thus, § 10, 16 USC § 1539 (1976 ed), creates a number of limited "hardship exemptions," none of which would even remotely apply to the Tellico Project. In fact, there are no exemptions in the Endangered Species Act for federal agencies, meaning that under the maxim expressio unius est exclusio alterius, we must presume that these were the only "hardship cases" Congress intended to exempt. Cf. National Railroad Passenger Corp. v. National Assn. of Railroad Passengers, 414 US 453, 458 (1974). (footnote omitted)

Similarly, the maxim "expressio unius est exclusio alterius," when applied to the statute in this case, compels the conclusion that noncompliance with the Act's requirements only can be excused if the conduct falls within a statutory exemption.

bear the responsibility of weighing the national interests affected by particular discharges and deciding whether an exemption is necessary. Both of these objectives are well documented in the legislative history of the Act.

In its discussion of the federal facilities section of the Act, the Senate Report stated:

> Evidence received in hearings disclosed many incidents of flagrant violations of air and water pollution requirements by Federal facilities and activities. Lack of Federal leadership has been detrimental to the water pollution control effort. The Federal Government cannot expect private industry to abate pollution if the Federal Government continues to pollute. This section requires that Federal facilities meet all control requirements as if they were private citizens.
>
> The Committee recognizes, however, that it may be in the paramount interest of the United States that a plant or facility not achieve full water pollution control within the time required. Therefore, the bill would provide case by case exceptions, on the basis of determination by the President, for a period of no more than one year.[112]

The Senate Report specifically targeted the Department of Defense as an agency that ought to curb its practice of polluting:

> As recognized under section 313 of the bill, Federal facilities generate considerable water pollution. Since some Federal agencies such as the Department of Defense have failed in abating pollution and in requesting appropriations to develop control measures, it is important to provide that citizens can seek, through the courts, to expedite the government performance specifically directed under section 313.[113]

Congress thus intended that agencies such as the Department of Defense could not continue to disregard the fed-

---

[112] Senate Report 67-68.

[113] *Id.* 80.

eral prohibitions against the discharge of pollutants. If the required prohibition interferes with the "paramount interest of the United States," the obvious remedy is the grant of a Presidential exemption. Congress wanted federal agencies that voiced concerns about the national interest to direct their pleas to the Commander-in-Chief. This approach implicitly acknowledges the President's particular expertise to assess national interests.[114]

Congressional insistence on strict federal facility compliance with the Act is reflected in the stringent limitations placed upon an exemption. The President alone is empowered to grant an exemption. Any exemption is limited in time.[115] The President, moreover, must certify that the exemption is in the national interest. Even if an exemption for a federal facility may otherwise be warranted, it cannot be based upon the lack of appropriations unless Congress previously has rejected an Executive Branch request for funds.

When viewed against the structure of the Act and the legislative history of the exemption provision, the trial court's lengthy analysis of national security considerations was clearly inappropriate. Contrary to the Navy's assertion, the exemption provision does not suggest "that national security interests are a proper factor for the court to consider in fashioning appropriate relief where ultimate compliance with the statutory standards can be achieved and the agency has elected to comply

---

[114] The exercise of this discretion has been held to be nonreviewable. Carter v. Colon, 633 F. 2d 964, 967 (1st Cir. 1980) ("It is difficult to imagine a determination more fully committed to discretion or less appropriate to review by a court"). The President has already issued one exemption under the Act for the military base on Fort Allen in Puerto Rico. 45 Fed. Reg. 66443 (Oct. 7, 1980). If this exercise of discretion is nonreviewable, then courts necessarily should be precluded from substituting their judgment for the President's: they should not decide whether national security concerns justify noncompliance with the Act in a particular case.

[115] *See* Senate Report 68.

with the Act rather than to seek an exemption." [116] The opposite is true.

Congress intended that national security considerations were to be weighed by the President through the prescribed procedure—not by a district court. A court's "balancing" of national security interests against the Congressional requirements is repugnant to the statutory scheme. Congress did not intend for courts to reassess the costs and benefits of compliance with the Act on a case-by-case basis, nor did it intend to allow courts to usurp the President's role as the sole source of an exemption for federal facilities. The Court of Appeals correctly ruled that the trial court acted improperly by engaging in a balancing exercise. The enforcement scheme and objectives of the Act mandated that this type of balancing was to be performed, if at all, by the President in response to a request for an exemption from the permit requirement.

The opportunity for an exemption makes the case for injunctive relief even more compelling here than in other cases decided by the Court. In *TVA v. Hill*, 437 U.S. 153 (1978), for example, the agency could not escape from its mandatory obligation to refrain from destroying critical habitat. It could only appeal to Congress for a change in the law. By contrast, here Congress has already provided the means for relief: a Presidential exemption. There is no need for a remand to the legislature for a change in the law if the activity in question truly is in the paramount interest of the United States.

The Navy's position in this case cannot be reconciled with the plain requirements of the Presidential exemption provisions of the Act. The Navy has been given what is tantamount to a "judicial exemption" for a period far beyond the one-year period provided by statute. The Navy failed to obtain a permit after the FWPCA was passed in 1972. The Navy permit applica-

---

[116] Navy Br. 23.

tion was filed on December 28, 1979. Nearly two years have elapsed since this application was filed. The Navy has yet to obtain a permit or a Presidential exemption that would excuse its noncompliance with the permit requirement. The Navy has violated the Act for the nine-year period since it was passed in 1972. It is flatly contrary to the clear requirements of the Act for the Navy to continue its discharges in the absence of a permit or a Presidential exemption.

CONCLUSION

For the foregoing reasons, Puerto Rico respectfully requests that the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

HECTOR REICHARD DE CARDONA
Secretary of Justice
Government of Puerto Rico

HOWARD CHARLES
Department of Justice
Government of Puerto Rico

GERARDO A. CARLO
Special Counsel to the Governor
Government of Puerto Rico

JOHN A. HODGES
(Counsel of Record)
TIMOTHY L. HARKER
LAWRENCE WHITE
JEFFREY N. MARTIN
PEABODY, LAMBERT & MEYERS
A Professional Corporation
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 457-1000
Counsel for the Respondents

December 21, 1981

STATUTORY APPENDIX

STATUTORY APPENDIX

Most of the pertinent portions of the Federal Water Pollution Control Act, 33 U.S.C. § 1351 *et seq.* (1976 & Supp. III 1979), are reprinted in the Appendix to the Navy's Petition for a Writ of Certiorari at 171-180a. The Navy, however, has omitted portions of the Act that are material to the issues presented in this case. Puerto Rico, therefore, has reproduced below the statutory provisions reproduced by the Navy as well as additional, material portions of the Act:

Section 101, 33 U.S.C. § 1251 (1976 & Supp. III 1979)

Declaration of Goals and Policy

(a) The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

* * * *

Section 301, 33 U.S.C. § 1311 (1976 & Supp. III 1979)

Effluent Limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives

In order to carry out the objective of this chapter there shall be achieved—

(1) (A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

* * * *

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2) (A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph,

effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title;

* * * *

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph not later than 3 years after the date such limitations are established, or not later than July 1, 1984, whichever is later, but in no case later than July 1, 1987.

(c) The Administrator may modify the requirements of subsection (b)(2)(A) of this section with

respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

* * * *

(g) (1) The Administrator, with the concurrence of the State, shall modify the requirements of subsection (b) (2) (A) of this section with respect to the discharge of any pollutant (other than pollutants identified pursuant to section 1314(a) (4) of this Act, toxic pollutants subject to section 1317(a) of this Act, and the thermal component of discharges) from any point source upon a showing by the owner or operator of such point source satisfactory to the Administrator that—

(A) such modified requirements will result at a minimum in compliance with the requirements of subsection (b) (1) (A) or (C) of this section, whichever is applicable;

(B) such modified requirements will not result in any additional requirements on any other point or nonpoint source; and

(C) such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an

unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities.

(2) If an owner or operator of a point source applies for a modification under this subsection with respect to the discharge of any pollutant, such owner or operator shall be eligible to apply for modification under subsection (c) of this section with respect to such pollutant only during the same time-period as he is eligible to apply for a modification under this subsection.

Section 302, 33 U.S.C. § 1312 (1976)

Water Quality Related Effluent Limitations

(a) Whenever, in the judgment of the Administrator, discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 1311(b)(2) of this Act, would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations (including alternative effluent control strategies) for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.

(b)(1) Prior to establishment of any effluent limitation pursuant to subsection (a) of this section, the Administrator shall issue notice of intent to establish such limitation and within ninety days of such notice hold a public hearing to determine the relationship

of the economic and social costs of achieving any such limitation or limitations, including any economic or social dislocation in the affected community or communities, to the social and economic benefits to be obtained (including the attainment of the objective of this Act) and to determine whether or not such effluent limitations can be implemented with available technology or other alternative control strategies.

(2) If a person affected by such limitation demonstrates at such hearing that (whether or not such technology or other alternative control strategies are available) there is no reasonable relationship between the economic and social costs and the benefits to be obtained (including attainment of the objective of this Act), such limitation shall not become effective and the Administrator shall adjust such limitation as it applies to such person.

(c) The establishment of effluent limitations under this section shall not operate to delay the application of any effluent limitation established under section 1311 of this Act.

Section 304, 33 U.S.C. § 1314 (1976 & Supp. III 1979)

Information and Guidelines

* * * *

(b) Effluent limitation guidelines

For the purpose of adopting or revising effluent limitations under this chapter the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of October 18, 1972, regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall—

* * * *

(3) identify control measures and practices available to eliminate the discharge of pollutants from categories and classes of point sources, taking into account the cost of achieving such elimination of the discharge of pollutants.;

* * * *

Section 309, 33 U.S.C. § 1319 (1976 & Supp. III 1979)

(a) Enforcement

(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

* * * *

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, or 1318, 1328, or 1345 of this Act, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this Act by him or by a State or in a permit issued under section 1344 of this Act by a State, he shall issue an order requiring such person to comply with such section or requirement,

or he shall bring a civil action in accordance with subsection (b) of this section.

* * * *

(5) (B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this chapter or in any permit issued under this chapter, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 1342 of this title was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an extension of the date referred to in section 1311(b)(1)(A) of this title to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

* * * *

(b) Civil actions

The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compli-

ance. Notice of the commencement of such action shall be given immediately to the appropriate State.

* * * *

Section 313, 33 U.S.C. § 1323 (1976 & Supp. III 1979)

Federal Facilities Pollution Control

(a) Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. * * * The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so; except that no exemption may be granted from the requirements of section 1316 or 1317 of this title. No such exemptions shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted

during the preceding calender year, together with his reason for granting such exemption. In addition to any such exemption of a particular effluent source, the President may, if he determines it to be in the paramount interest of the United States to do so, issue regulations exempting from compliance with the requirements of this section any weaponry, equipment, aircraft, vessels, vehicles, or other classes or categories of property, and access to such property, which are owned or operated by the Armed Forces of the United States (including the Coast Guard) or by the National Guard of any State and which are uniquely military in nature. The President shall reconsider the need for such regulations at three-year intervals.

Section 401, 33 U.S.C. § 1341 (1976 & Supp. III 1979)

Certification

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such

certification shall not be deemed to satisfy section 1371(c) of this title. * * * If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act, on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

* * * *

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

Section 402, 33 U.S.C. § 1342 (1976 & Supp. III 1979)

National Pollutant Discharge Elimination System

(a) Permits for discharge of pollutants

(1) Except as provided in section 1328 and 1344 of this title, the Administrator may, after oppor-

tunity for the public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements to paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder subsection (b) of this section.

* * * *

(b) At any time after the promulgation of the guidelines required by subsection (h)(2) of section 1314 of this Act, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency,

that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, and 1343;

(B) are for fixed terms not exceeding five years;

* * * *

(j) A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

(k) Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365, with sections 1311, 1312, 1316, 1317, and 1343, except any standard imposed under section 1317 for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) sections 1311, 1316, or 1342 of this Act, or (2) section 13 of the Act of March 3, 1899, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on the date of enactment of the

Federal Water Pollution Control Act Amendments of 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date of enactment which source is not subject to section 13 of the Act of March 3, 1899, the discharge by such source shall not be a violation of this Act if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

* * * *

Section 403, 33 U.S.C. § 1343 (1976)

Ocean Discharge Criteria

(a) No permit under section 1342 of this Act for a discharge into the territorial sea, the waters of the contiguous zone, or the oceans shall be issued, after promulgation of guidelines established under subsection (c) of this section, except in compliance with such guidelines. Prior to the promulgation of such guidelines, a permit may be issued under such section 1342 if the Administrator determines it to be in the public interest.

(b) The requirements of subsection (d) of section 1342 of this Act may not be waived in the case of permits for discharges into the territorial sea.

(c) (1) The Administrator shall, within one hundred and eighty days after enactment of this Act (and from time to time thereafter), promulgate guidelines for determining the degradation of the waters of the territorial seas, the contiguous zone, and the oceans, which shall include:

> (A) the effect of disposal of pollutants on human health or welfare, including but not limited to plankton, fish, shellfish, wildlife, shorelines, and beaches;

(B) the effect of disposal of pollutants on marine life including the transfer, concentration, and dispersal of pollutants or their by-products through biological, physical, and chemical processes; changes in marine ecosystem diversity, productivity, and stability; and species and community population changes;

(C) the effect of disposal, of pollutants on esthetic, recreation, and economic values;

(D) the persistence and permanence of the effects of disposal of pollutants;

(E) the effect of the disposal at varying rates, of particular volumes and concentrations of pollutants;

(F) other possible locations and methods of disposal or recycling of pollutants including land-based alternatives; and

(G) the effect on alternate uses of the oceans, such as mineral exploitation and scientific study.

(2) In any event where insufficient information exists on any proposed discharge to make a reasonable judgment on any of the guidelines established pursuant to this subsection no permit shall be issued under section 1342 of this Act.

Section 502, 33 U.S.C. § 1362 (1976 & Supp. III 1979)

Definitions

Except as otherwise specifically provided, when used in this chapter:

* * * *

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and indus-

trial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

(8) The term "territorial seas" means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.

(9) The term "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone.

(10) The term "ocean" means any portion of the high seas beyond the contiguous zone.

* * * *

(12) The term "discharge of pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * * *

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding, operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture.

* * * *

Section 504, 33 U.S.C. § 1364 (1976 & Supp. III 1979)

Emergencies

Emergency Powers

(a) Notwithstanding any other provision of this chapter, the Administrator upon receipt of evidence that a pollution source or combination of sources is presenting an imminent and substantial endangerment to the health of persons or to the welfare of persons where such endangerment is to be the livelihood of such persons, such as inability to market shellfish, may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person causing or contributing to the alleged pollution to stop the discharge of pollutants causing or contributing to such pollution or to take such other action as may be necessary.

* * * *

Section 505, 33 U.S.C. § 1365 (1976)

Citizen Suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) Notice

No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or

order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator

(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

Office - Supreme Court, U.S.
FILED
FEB 16 1982
ALEXANDER L. STEVAS,
CLERK

No. 80-1990

In the Supreme Court of the United States

OCTOBER TERM, 1981

CASPAR WEINBERGER, ET AL., PETITIONERS

v.

CARLOS ROMERO-BARCELO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONERS

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Cases: Page

City of Philadelphia v. *EPA*, Civ. No. 78-878 (E.D. Pa. Sept. 25, 1979) 8
Commodity Futures Trading Commission v. *Hunt*, 591 F.2d 1211 3
Hecht Co. v. *Bowles*, 321 U.S. 321 2
National Wildlife Federation v. *Gorsuch*, Civ. Action No. 79-0915 (D.D.C. Jan. 29, 1982) 6, 7
Rondeau v. *Mosinee Paper Corp.*, 422 U.S. 49 2
State Water Control Board v. *Washington Suburban Sanitary Commission*, Civ. No. 1813-73 *et al.* (D.D.C. July 29, 1974) 9
TVA v. *Hill*, 437 U.S. 153 ..... 2, 3
United States v. *City of New York*, 77 Civ. 76 (S.D.N.Y. Mar. 1, 1977) 9
United States v. *Puerto Rican Aqueduct and Sewer Authority*, Civ. No. 78-38 (D.P.R. Feb. 27, 1978) 8-9
United States v. *Sexton Cove Estates, Inc.*, 526 F.2d 1293 8
Wilderness Society v. *Morton*, 479 F.2d 842, cert. denied, 411 U.S. 917 3

Statutes:

Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. (& Supp. III) 1251 *et seq.*:
Section 301(a), 33 U.S.C. 1311(a) 6, 7, 8, 9
Section 309(c)(1), 33 U.S.C. (Supp. III) 1319 (c)(1) 4, 8
Section 309(d), 33 U.S.C. (Supp. III) 1319 (d) 3-4, 8
Section 401(a)(1), 33 U.S.C. (Supp. III) 1341 (a)(1) 4
Section 402, 33 U.S.C. (& Supp. III) 1342 7
Section 404, 33 U.S.C. (Supp. III) 1344 7
Section 502(14), 33 U.S.C. (Supp. III) 1362 (14) 6

Miscellaneous:

4 A *Legislative History of the Clean Water Act of 1977*, 95th Cong., 2d Sess. (1977) 8

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-1990

CASPAR WEINBERGER, ET AL., PETITIONERS

v.

CARLOS ROMERO-BARCELO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONERS

---

1. Respondents claim that the government would permit federal courts to sanction continuing violations of the Clean Water Act and thus, through the exercise of equitable discretion, modify the standards applicable to the discharger (Resp. Br. 29). To the contrary, as the government's opening brief clearly states, upon a finding of a violation of the Act, an appropriate remedy should be devised "to bring the violator into compliance with the requirements of the Clean Water Act as expeditiously as practicable" (Pet. Br. 18). The sole question presented in this case is whether the federal courts retain the discretion to formulate such a remedy without ordering

immediate cessation of the violating discharges for the period necessary for the remedial program to effect a cure.

We have never contended that the court may re-evaluate the statutory standards, much less ignore the statutory purposes. But the requirement that the court's equitable discretion must be exercised in light of the statutory purposes does not mean, as respondents suggest (Resp. Br. 24-25), that the court's discretion may be exercised only when there is no likelihood of a continuing violation, and that in all other situations the court must order the immediate cessation of the challenged conduct. Instead, as *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330 (1944), and *TVA* v. *Hill*, 437 U.S. 153, 194 (1978) make clear,[1] the court may properly conclude that allowing the violator a reasonable time to bring his conduct into compliance with the statutory requirements may be the best way of "'insuring better compliance in the future.'"[2]

In analyzing the remedial discretion of the federal courts in enforcing the Clean Water Act, the pur-

---

[1] Respondents are incorrect in reading *Hecht Co.* v. *Bowles*, *supra*, and *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49 (1975), as limited to situations in which the statutory violation has terminated. Indeed, the Court noted in *Hecht Co.* v. *Bowles*, *supra*, 321 U.S. at 327, that the cessation of violations was not the controlling factor in its decision. Instead, that kind of rigid limitation on equitable discretion is precisely the sort of "major departure from * * * long [equitable] tradition" the Court there rejected. 321 U.S. at 329-330.

[2] That is certainly the situation here, where an immediate cessation order would require the Navy to obtain a presidential exemption from the statute, despite its readiness to seek a permit and thereby bring itself into compliance with the statutory requirements (see Pet. Br. 13 n.14).

poses and policies of the Clean Water Act—and not those of the Endangered Species Act—must be studied. For this reason, the court of appeals erred in applying a standard for remedial orders developed to satisfy the Endangered Species Act in *TVA* v. *Hill*, 437 U.S. 153 (1978). As the government noted in its opening brief, the differences in language, structure, and purpose of the two Acts justify different constraints on the equitable discretion of the courts in enforcing their mandates.[3]

2. Respondents attempt to justify the stringent restrictions on the district court's remedial discretion by asserting (Resp. Br. 35-36) that such limitations are necessary in order to induce dischargers to apply for a permit and conform to requirements of the Act prior to administrative or judicial enforcement. Respondents, however, overlook the alternative enforcement remedies available to district courts. In addition to equitable remedies, the Clean Water Act specifically provides for both civil and criminal monetary penalties. Section 309(d), 33 U.S.C. (Supp. III)

---

[3] For that same reason, other cases on which respondents rely, *e.g.*, *Commodity Futures Trading Commission* v. *Hunt*, 591 F.2d 1211 (7th Cir. 1979), and *Wilderness Society* v. *Morton*, 479 F.2d 842 (D.C. Cir.) (en banc), cert. denied, 411 U.S. 917 (1973), do not support their position (Resp. Br. 25). *Hunt* and *Wilderness Society* each involved a statute or regulation that absolutely forbids certain types of conduct and did not, as in the case of the Clean Water Act, provide for the issuance of administrative permits to allow the conduct under appropriate circumstances. Only through cessation of the activities in question (in *Hunt*, maintaining excessively large speculative positions in the soybean futures market, and, in *Wilderness Society*, permitting the building of pipelines through federal lands on rights-of-way exceeding a certain width) could compliance with the law ever be achieved.

1319(d), provides for civil penalties of up to $10,000 for each day of violation. If the violation of the Act is deemed to be willful, Section 309(c)(1), 33 U.S.C. (Supp. III) 1319(c)(1), may be invoked to assess criminal penalties of from $2,500 to $25,000 per day of violation.[4] Thus, the Clean Water Act includes penalties specifically designed to induce prompt compliance with the provisions of the law; the equitable discretion of the district courts need not be hobbled to provide punishment for past failures of dischargers to achieve compliance. Instead, the equitable or injunctive remedy devised by the courts should be primarily aimed at achieving compliance with the Act in the future.[5]

Second, respondents contend (Resp. Br. 39) that an immediate cessation order must be entered by the district court in order to preserve the states' interests in maintenance of water quality. The argument appears to be that, since the states must certify an EPA-issued NPDES permit as conforming to state water quality standards (Section 401(a)(1), 33 U.S.C. (Supp. III) 1341(a)(1)), the courts are required to order immediate cessation of non-permitted discharges to vindicate the states' water quality interests. Water quality considerations may well lead a district court to order immediate cessation of non-

---

[4] In addition, 33 U.S.C. (Supp. III) 1319(c)(1) provides for imprisonment of up to one year for willful violations of the Clean Water Act.

[5] A violator's past conduct, however, is a factor to be considered in formulating a remedy that will bring him into compliance in the future. Past unwillingness to conform to the requirements of the Act would suggest a more rigorous and more closely supervised remedial program to ensure that future compliance is achieved.

permitted discharges.[6] But, in the present case, the district court found, and the court of appeals affirmed the finding, that the Navy activity did not violate the applicable water quality standards (Pet. Br. 6-8).[7] Thus, respondents' argument would have this Court require the district court to enter an immediate cessation order to vindicate state interests that, on this record, have not been compromised.[8]

---

[6] Even if water quality standards are found to be violated, immediate and total cessation of discharges may not be necessary to remedy the violations found. Depending upon the circumstances, limitations on discharges, short of total cessation, or other remedies, may be adequate to protect the states' legitimate interest.

[7] As explained in petitioners' opening brief (Pet. Br. 6 n.5), the Navy applied for an NPDES permit in December 1979. In December 1981, the Environmental Quality Board of the Commonwealth of Puerto Rico, a respondent in this case, denied the Navy a water quality certificate. The Navy has filed for reconsideration of this decision pursuant to Commonwealth law. As of this writing, the request for reconsideration is still pending. Should the Commonwealth authorities finally determine that a water quality certificate will not be granted for the NPDES permit, judicial review of the Commonwealth's determination may be pursued. In the meantime, once jurisdiction over the Clean Water Act remedy in this case is returned to the district court, the Commonwealth may find it appropriate to request additional relief in that court, based on this new determination, to vindicate their water quality interests.

[8] Respondents incorrectly suggest (Resp. Br. 38 & n.95) that recognizing the district courts' remedial discretion imposes an unfair burden on citizens seeking to enforce the Act's permit requirements, because it requires them to establish that the balance of equities favors an immediate cessation order. But we do not suggest that this burden falls on those seeking to enforce the Act. Here, the Navy established that the purposes of the Act, and the public interest, will best

3. The court of appeals' rationale for holding (Pet. App. 48a) that the district court lacked discretion in this case to enter any kind of remedial decree other than an immediate cessation order logically requires the same remedial inflexibility for *any* violation of Section 301(a) of the Clean Water Act, 33 U.S.C. 1311(a), the Act's central prohibitory provision, which incorporates by reference restrictions in other sections of the Act. A brief survey of the broad range of possible violations of Section 301(a) demonstrates that this inflexibility would create immeasurable hardship, cause wholesale disruption of efforts to administer the Act, and require a sharp break with a settled administrative and judicial practice of shaping curative decrees responsive to the consequences and other circumstances of the violation.

At one extreme are ongoing activities which could be shut down only with great damage to national interests and for which federal and state agencies have developed no permit standards, either because the activities, as in the present case, are unique operations producing discharges that apparently have no appreciable negative impact on the waters in question or because, as in a recent district court case, the activities were long regarded as falling outside the Act's coverage. In a case exemplifying the latter circumstances, *National Wildlife Federation* v. *Gorsuch*, Civ. Action No. 79-0915 (D.D.C. Jan. 29, 1982), the district court has held that existing dams are "point sources" (see 33 U.S.C. (Supp. III) 1362 (14)) that must be regulated under the NPDES

---

be served by permitting a reasonable time for the achievement of compliance with the Act. The question is only whether the district court retains the discretion to make that decision on a proper showing by the discharger.

permit system (see 33 U.S.C. (& Supp. III) 1342). That ruling is contrary to the views of the federal government, which had previously classified dams as non-point sources; but if the ruling is sustained, the owners and operators of hundreds of thousands of dams throughout the country may find themselves in violation of Section 301(a) of the Clean Water Act for discharging pollutants from a point source without an NPDES permit.[9] An active permitting program would, in time, cure such violations. But, in the meantime, the dam owners and operators would be in the position the Navy finds itself in here: waiting for the pollution control agencies of the federal government and the states to devise permit requirements and process permit applications respecting an activity not previously regulated under the Act.

At the other end of the spectrum are activities in violation of the Act for which immediate cessation orders are essential. For example, activities involving the filling of wetland areas, regulated under Section 404 of the Act, 33 U.S.C. (Supp. III) 1344, are typically subject to administrative cease and desist orders; and when these are unavailing, preliminary and permanent court injunctions against filling without a Section 404 permit are sought. Such remedies

---

[9] The district court acknowledged that there are more than two million dams in the country, of which 50,000 to 60,000 are "large dams," *i.e.*, those at least 25 feet high with a storage capacity of 15 acre-feet or those at least six feet high with a storage capacity of more than 50 acre-feet. *National Wildlife Federation* v. *Gorsuch*, *supra*, slip op. 34 & n.78. The NPDES permit requirement would apply to all dams that do or may discharge pollutants, and the district court was apparently unable to estimate how many that might be, suggesting only that some might be dealt with by areawide or general permits. Slip op. 34.

are pursued because the deposit of fill in wetlands alters the character of those lands and prevents them from performing their function in the hydrological cycle, and because once the fill has been placed, complete restoration of the wetlands may be neither technologically feasible nor financially practicable. See, *e.g.*, *United States* v. *Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1301 (5th Cir. 1976). In such cases, the congressional objective of preventing the destruction of wetlands (see 4 *A Legislative History of the Clean Water Act of 1977*, 95th Cong., 2d Sess. 869, 920 (1977)) would be frustrated by a failure to order immediate cessation of the activity.

The most typical violation of Section 301(a) of the Clean Water Act, however, involves a discharger's failure to comply with the terms of its NPDES permit. Although in some of these cases, an immediate cessation order may be warranted, the usual administrative and judicial response has been to establish a schedule setting out a phased program to bring the violator back into compliance with its permit and the Act.[10] The sewage treatment facilities in Puerto Rico and many major cities throughout the Nation, including New York, Philadelphia, and Washington, D.C., have been subjects of such compliance schedule orders rather than orders of the kind required under the theory of the court below, which would mandate immediate cessation of the discharge of the treated sewage of those areas into waters of the United States. See *City of Philadelphia* v. *EPA*, Civ. No. 78-878 (E.D. Pa. Sept. 25, 1979); *United States* v. *Puerto Rican Aqueduct and Sewer Authority*, Civ.

---

[10] Such a compliance schedule may also be supplemented by monetary penalties pursuant to Section 309(c)(1) and (d) of the Act, 33 U.S.C. (Supp. III) 1319(c)(1) and (d).

No. 78-38 (D.P.R. Feb. 27, 1978); *United States* v. *City of New York*, 77 Civ. 76 (S.D.N.Y. Mar. 1, 1977); *State Water Control Board* v. *Washington Suburban Sanitary Commission*, Civ. No. 1813-73 *et al.* (D.D.C. July 29, 1974).

In sum, the past response to violations of Section 301(a) of the Clean Water Act has not been automatic entry of an immediate cessation order. The nature of the remedy devised is dependent upon the nature of the violation and its relationship to the purposes of the Clean Water Act. Only one feature of the remedial response is automatic and mandatory: that the remedial order be designed to bring the violator into compliance with the Act's requirements within a reasonable time.

CONCLUSION

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

FEBRUARY 1982

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 360988 603